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REPORT OF THE LAW COMMISSION ON THE REVIEW
OF THE TRADITIONAL COURTS ACT
(CAP. 3:03)

TO: THE HONOURABLE HENRY D. PHOYA, MINISTER OF JUSTICE

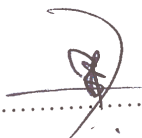
This is the Report on the Review of the Traditional Courts Act by the special Law Commission on the Review of the Traditional Courts Act appointed under section 133 of the Constitution.

We, the members of the Commission, submit this Report pursuant to section 135 of the Constitution and commend the Report and its recommendations to the Government, Parliament and the people of Malawi.

MEMBERS

HONOURABLE JUSTICE EDWARD B. TWEA

Chairperson
Judge of the High Court of
Malawi



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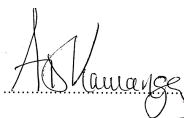
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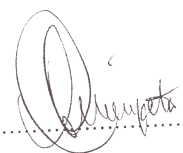
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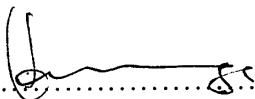
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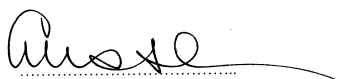
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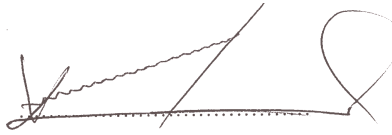
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Dated: 5th October, 2007

Programme Officer

The Principal Programme Officer for this programme was Mrs. Janet Laura Banda, Chief Law Reform Officer. Mr. Peter T. Chiniko and Mr. William Yakuwawa Msiska, Deputy Chief Law Reform Officer and Assistant Chief Law Reform Officer respectively served as assisting programme officers. During the duration of the programme, Mrs. Janet Laura Banda was responsible for the co-ordination of all aspects of the programme, the development of the Report and preparation of the draft legislation to incorporate the recommendations of the Commission.

BACKGROUND

The administration of primary justice in the rural Malawi has always been done at two levels. The most frequent and readily available justice system is the non-state customary system of justice applied by traditional leaders to resolve disputes using customary justice forums. These are commonly known as “Pabwalo”. The colonialists regarded these forums as obstacles to development and anticipated their eventual phase out through the process of modernizing Africa¹. This did not occur and the forums have remained widespread as ever and co-existed with the other system introduced by colonialists. In Nyasaland, this other system was introduced in 1933 through the enactment of the Native Courts Ordinance and the establishment of “Native Courts”. Some writers refer to this system as the “State’s justice system”². Under this system, the State administered customary law through Provincial Commissioners and Chiefs acting as advisors or assessors. Section 4 of the Native Courts Ordinance required that the constitution of the native court should be in accordance with the native law or custom of the area in which the court had jurisdiction. The system was viewed as an attempt by the colonial Government to assimilate the non-state customary justice system into the State legal system so as to exert control over Africans in all spheres³. This is evidenced by the substance of the Native Courts Ordinance, 1947 which conferred powers on the Provincial Commissioner to prescribe by warrant the constitution of native courts and even the order of precedence of members of such courts. That Ordinance was superseded by the Local Courts Ordinance of 1962. During this period chiefs believed they were instruments of the Government⁴.

The jurisdiction of courts under the Local Courts Ordinance of 1962 extended only to Africans and to all civil and criminal matters. However, Local Courts did not have jurisdiction in certain matters such as where the charge was murder or other offence punishable with death or life imprisonment; or where proceedings were in connection with marriage contracted under the Marriage Ordinance; or in any other class of proceedings excluded by the Minister by Notice published in the *Gazette*.

The Local Courts Ordinance of 1962 was amended in the short title and renamed the “Local Courts Act” on attainment of independence in 1964. This Act replicated the Ordinance in every respect except for the colonial terminologies and the extension of jurisdiction of Local Courts to non-Africans in certain cases. The Local Courts Act was later amended in 1969⁵ to be titled the Traditional Courts Act. Other substantive amendments were made during the same year extending jurisdiction of Traditional Courts to capital offences⁶. This was triggered by the

¹ *Access to Justice in Sub-Saharan Africa: the role of traditional and informal system*; Penal Reform International, January 2001

² *Ibid*

³ *Ibid*.

⁴ See speech of Hon. Chidzanja MP (Lilongwe South) during the Second Reading of the Local Courts Bill Hansards 1961-62 page 212.

⁵ Act No. 31 of 1969.

⁶ GN 31 of 1969.

acquittals in the cases that have become to be commonly known as the “Chilobwe murders”. The other substantive amendment was made in 1970 restricting the appeal procedures to the National Traditional Appeal Court as the highest court of appeal rather than the High Court⁷. These amendments established a separate and parallel court system to the High Court. The result was a dramatic change to the Malawi legal system. One system was rooted in the judicial branch of Government as is required by international practice and democratic principles while as the other one was embedded in the Executive branch of Government. The latter had its own problems and in most cases was used as a political tool to suppress opposition in the one party system of Government.

The new constitutional dispensation necessitated the integration of the two systems in 1994-1995. This has given rise to a number of problems in implementation and access. For example, Magistrate Courts cannot handle matters involving customary land disputes. Jurisdiction over such matters is given to Traditional Courts by the Land Act⁸. Though the High Court does have jurisdiction in such matters, the handicap is that the courts are only in Blantyre, Lilongwe, Mzuzu and Zomba. Arguably, the High Court is also conceptually far removed to handle matters involving customary land disputes. It follows therefore that litigants, especially in the rural areas, do not have any readily accessible avenue for legal redress as at present. Secondly, Magistrates Courts did not, until 2000, have jurisdiction over disputes arising out of marriages celebrated under customary law, Islamic law and those marriages celebrated under the African Marriage (Christian Rites) Registration Act⁹. There has also been general dissatisfaction with the way magistrate courts handle such disputes due to lack of expertise of such courts in matters involving customary law.

The integration also created a serious backlog of cases and brought a heavy strain on the limited resources of the Judiciary. The wholesale incorporation of Traditional Courts staff, without training into the Judiciary has also raised serious problems of judicial competence. Magistrates have generally shown lack of knowledge of customary law whilst magistrates who were former Traditional Courts Chairmen have displayed handicaps in dealing with criminal law matters. This has resulted in perceptions among the general public of general inefficiency in the Judiciary.

Even with the amendments conferring 3rd grade and 4th grade magistrates courts powers to handle matrimonial cases and providing procedures in dealing with small claims, there has been impediment of access to justice for the rural masses in terms of access to familiar courts and to familiar court procedures. Access to affordable, effective and appropriate remedies has also been denied.

The need to review the Traditional Courts Act, therefore, stems from all the above problems and the recommendations made by the Task Force on Legal and

⁷ GN 38/1970, GN5/1970

⁸ Cap 57:01, of the Laws of Malawi *see* 36 (2)

⁹ Cap 25:02 of the Laws of Malawi

Judicial Reforms in its Report published in 1996, which although was focused on criminal justice reforms, concluded that an effective and efficient court system is a prerequisite to any reforms to the justice system. That Report emphasized the need to review all statutes regulating the administration of the courts.

This work has been carried out by the Special Commission on Criminal Justice Reforms (“the Commission”). The special Commission prioritized the review of the Traditional Courts Act over the other statutes regulating courts for a number of reasons. The most significant is the obvious gap that has been created in the formal administration of primary justice. This has allegedly affected the enjoyment of the right of access to justice by the ordinary Malawian. This perception is grounded in the fundamental differences between Western and African conceptions of the purposes of administration of justice. The special Commission was also influenced by the provisions of the Constitution in arriving at its decision to prioritize the review of the Traditional Courts Act. The Constitution recognizes the existence of traditional or local courts and the continuing of legal suits in specified Traditional Courts under sections 110 (3) and 204 respectively.

Terms of Reference

The special Commission adopted the following Terms of Reference to guide its work—

- carry out a general review of the Traditional Courts Act and suggest amendments in line with the 1994 Constitution;
- examine the current status of the informal justice system and consider the extent to which the informal justice system could be incorporated into the formal justice system;
- consider ways of enhancing access to justice for the poor or ordinary Malawians through the primary justice court system;
- consider an appropriate name for courts dispensing primary justice (primary courts) referred to as “traditional or local courts” under section 110 (3) of the Constitution;
- define the limit of the civil and criminal jurisdiction of traditional or local courts;
- determine the establishment and structure of traditional or local courts;
- determine the laws to be administered in traditional or local courts;
- consider the question of supervision, reviews and appeals from traditional or local courts;
- consider the question of legal representation and other representation in traditional or local courts;
- provide for rules to regulate practice and procedure in traditional or local courts;
- consider ways of enhancing the effectiveness and efficiency of the informal justice sector;

-
- produce a Report containing findings and recommendations, accompanied by draft legislation based on the recommendations, to be submitted to the Minister of Justice for laying in Parliament.

The Commission met several times in plenary and in committees to review the Act and subsidiary legislation. As part of the process, the special Commission consulted widely through both the electronic and print media, field visits and also through two workshops with stakeholders which included chiefs, civil society and members of the judiciary. Further, the Commission considered reports and relevant laws of other countries notably, South Africa, Zambia and Botswana.

Structure of the Report

The Report commences with a brief overview of the Traditional Courts Act. This is followed by a synopsis of the proposed new legislation, then a detailed analysis of the Traditional Courts Act from a thematic view point. Different themes that needed addressing in the Act were identified as indicated in the Terms of Reference and the special Commission made recommendations along these themes. All matters recommended to be brought into the new Act have been indicated in **bold**. However, in the case of subsidiary legislation, the Commission resorted to the traditional approach of detailed analysis by sequence of parts and sections because this approach could not be avoided. Similarly, all new matters recommended to be brought into the subsidiary legislation are shown in bold.

Overview of Traditional Courts Act (Cap.3:03)

The Traditional Courts Act was enacted in 1962 to make provision for the establishment and constitution of Traditional Courts and for the proper administration of justice by such courts. The Act repealed and replaced the Local Courts Act and established the office of a Chief Traditional Courts Commissioner with extensive powers to ensure the proper administration of the Act.

The omnibus provisions of the Act can be categorized into six major areas.

Establishment and Constitution

Establishment and constitution of Traditional Courts is provided for in sections 3 to 6. The Courts are established by warrant under the hand of the Minister and the members, including the Chairmen of the Courts, are appointed by the Minister. The Minister is also empowered to appoint a panel of assessors for each court.

Jurisdiction

Sections 8 to 11 provide for matters of jurisdiction. The Traditional Courts are empowered to exercise both civil and criminal jurisdiction which is set out in the Establishment Warrant of each court. Further, jurisdiction is determined by race and territory.

Laws to be administered

In terms of the laws to be administered in Traditional Courts, section 12 is very explicit and confines this to written laws which authorize Traditional Courts to administer such laws, regulations, rules, and orders, or by-laws made under the Local Government legislation and the customary law prevailing in the area of jurisdiction of the court so far as the customary law is not repugnant to justice or morality or inconsistent with the Constitution.

Practice and Procedure

Matters of practice and procedure are regulated by subsidiary legislation under the Traditional Courts (Procedure) Rules which provide for both civil and criminal procedures to be followed by Traditional Courts.

Appeals

Appeals are provided for under sections 34 and 35 of the Act. Appeals from the lower cadre of Traditional Courts go to the District Appeals Court and finally all the way up to the National Traditional Appeal Court thereby establishing an independent and parallel system to the High Court. The detailed procedures to be followed on appeal are set out in the Traditional Courts (Appeals) Rules.

Enforcement of Judgements

Section 17 of the Act provides for the enforcement of judgements of Traditional Courts where there is default through the making of orders by the relevant court relating to specific property of the defaulter. The Traditional Courts (Enforcement of Judgements) Rules which are comprehensive provide the minute detail of the processes to be followed in effecting orders made under section 17.

Synopsis of Draft New Legislation

The Draft Bill proposed by the special Commission seeks to introduce a new genre of courts to be named “Local Courts” with the primary function of dispensing familiar and affordable justice for the ordinary Malawian in line with the spirit of the Constitution which aims at enhancing the enjoyment of the right of access to justice by all citizens.

The jurisdiction of the proposed courts is confined to the administration of customary law in civil matters and exercising limited jurisdiction in criminal matters. To that extent, only minor statutory criminal offences should be handled by these courts. In arriving at this proposal, the special Commission was influenced by section 110 of the Constitution and the recognition that Magistrate courts can never replace courts of this nature due to the differences in practice and procedures. The Commission thus realized that access to justice by the ordinary Malawian residing in the rural areas shall be denied if all matters, including customary civil matters, continue to be handled by magistrate courts which are ill-equipped to handle such matters. However, the special Commission recognizes that there are certain civil matters at customary law which are handled to the detriment of women and children due to established customs and other matters which result in persecution of suspects. The special Commission thus proposes to exclude such matters from the jurisdiction of Local Courts. Such matters include: inheritance issues, matters involving custody of children, cases of witchcraft, land disputes and matters involving distribution of matrimonial property.

Further, the draft Bill proposes to establish Local Courts as a parallel structure to magistrate courts with an appellate structure at District level and all the way up to the Supreme Court. Matters of practice and procedure, appeals and enforcement of judgements of Local Courts would comprehensively be provided for in subsidiary legislation.

SPECIFIC FINDINGS AND RECOMMENDATIONS

1. WHETHER OR NOT TO RE-INTRODUCE TRADITIONAL COURTS

The first issue that the special Commission was faced with in carrying out reforms to the Traditional Courts Act was whether indeed it is necessary to bring back Traditional Courts in Malawi in view of the abolition of the National Traditional Appeal Court and the Regional Traditional Courts and the integration of other Traditional courts into the Judiciary. Ancillary to that, was the issue whether such integration has affected the enjoyment of the right of access to justice by the ordinary Malawian especially in the rural areas.

Firstly, the special Commission noted that section 204 of the Constitution provides for the continuation of pending legal actions in specific courts such as the District Traditional Appeal Courts and the Grade A and Grade B Traditional Courts. The Commission thus considers that this provision anticipates the continued existence of Traditional Courts.

Secondly, the special Commission noted that section 110 of the Constitution creates courts subordinate to the High Court and observed that subsection (3) of that provision empowers Parliament in its discretion to establish Traditional or Local Courts to be presided over by chiefs or lay persons. Pursuant to this, the Commission arrived at the conclusion that the Constitution anticipates the continued existence of traditional or local courts, and that such courts may only exist as courts subordinate to the High Court without necessarily intergrating them into the magistracy.

Having resolved the first issue, the special Commission took the matter to stakeholders to determine whether the Malawian society considered it desirable to have traditional or local courts re-introduced in view of the bad history associated with the courts which led to their abrupt dismantling in 1993. This was done at two fora. The first one was phone-in radio programmes on Capital FM 102.50 aired on 2nd and 5th July, 2004. A total of 106 persons contributed to the two programmes and a majority of the contributors to the programmes representing 89% favored the re-introduction of traditional courts.

The second forum was the Initial Consultative Workshop on the Review of the Traditional Courts Act held on 24th to 25th August, 2004 in Lilongwe where it was agreed generally that the courts should be re-introduced for a number of reasons. Among the reasons cited were that traditional courts are geographically and procedurally closer to the people and that the courts handle customary matters better than magistrate courts due to the presiding officers' special orientation in customary law. It was further suggested that re-introduction of these courts shall reduce backlog in magistrate courts and provide a filter for petty cases¹⁰.

The special Commission, however, observed that 4th grade magistrate courts are housed in what used to be Grade A and B Traditional Courts, and concluded that

¹⁰ See Report of the Workshop on the Review of Traditional Courts Act, September, 2004, page 20.

the issue is not geography but rather functionality and effectiveness of these courts. Consequently, the special Commission conceded that the absence of these courts may have contributed to the denial of access to justice significantly in the rural areas since people are deprived of access to familiar courts and familiar courts procedures. Further, the inability of the present magistrate courts to competently handle customary civil matters is a further factor to warrant re-introduction of these courts.

The Commission thus recommends re-introduction of these courts to promote the spirit of the Constitution; to provide an avenue for preserving customary law; and more importantly, to address the problems of access to justice by the rural populace created by either the abolition or integration of Traditional courts into the Magistracy.

2. NAME OF COURTS

Presently, the courts established under the Traditional Courts Act are known as “Traditional Courts”. The Constitution, however, has given discretion to Parliament to name these courts either “traditional” or “local” courts. The Commission took the two constitutional options to stakeholders for guidance. At the initial consultative workshop, the issue of name for the courts was not debated extensively and there was no consensus on the preferred name.

The Commission then took the issue of name for the courts to the grassroots and went to seven districts namely Rumphu, Nkhata Bay, Ntchisi, Salima, Zomba, Balaka and Mchinji. The predominant view from the survey conducted in these districts was that the courts should be called “Local Courts”¹¹. The rejection of the name “Traditional Courts” was largely influenced by the stigma associated with the defunct Traditional Courts.

In debating the issue further, the Commission considered the pros and cons of using either name as revealed by the survey. The Commission was aware that the current name of the courts, namely, “Traditional Courts”, is apt and gives a correct image in terms of functions of the courts. The name also has the advantage of familiarity. The special Commission, however, recognized that utilizing the present name might run the risk of rejection from stakeholders because of the perceived manner in which these courts were used in the single party regime resulting in stigmatization.

On the other hand, the Commission was aware that the name “Local Courts” has the disadvantage of not giving the correct image in terms of the functions of the courts. The Commission however observed that the advantages to this name include lack of stigma or bad history to the name and also the fact that it is a previous name of the Courts¹². The Commission therefore indorses the findings of the survey carried out in the seven districts and recommends that the name for the courts should change to **“Local Courts”** and the short title to the new Act should accordingly read **“the Local Courts Act”**.

¹¹ 793 out of 1364 respondents.

¹² i.e under the Local Courts Act

3. ESTABLISHMENT AND CONSTITUTION

3.1 *Establishment and Status*

The Traditional Courts Act empowers the Minister to establish Traditional Courts by warrant under his hand¹³. These Courts are established as an organ of the executive arm of Government. The Constitution on the other hand anticipates that traditional or local courts shall be subordinate to the High Court and empowers Parliament to make provision for such courts¹⁴ to be presided over by chiefs or lay persons.

The Commission concluded that under the scheme of the Constitution, the anticipated local courts may only be established by an Act of Parliament as part of the Judiciary. Having reached this conclusion, the Commission considered the ancillary issue of status of the proposed Local Courts in view of the fact that the Constitution envisages that such Courts may be presided over by Chiefs who are essentially under the executive branch of Government¹⁵. The Commission thus grappled with the question whether these should be courts or tribunals. The Commission was however aware that any attempt to establish these “courts” as tribunals may not conform to the Constitution.

The Commission took the matter to stakeholders at the initial consultative workshop where the findings indicated that the majority were in favour of these courts to be courts of law¹⁶. This is in line with the Constitution which has placed these courts in the category of subordinate courts under section 110 which should be accorded the necessary powers and dignity. Such powers must include the power to enforce decisions to ensure respectability and ultimately to lessen the workload on the magistrate courts. The Commission also observed that the Constitution has under section 111 (4) defined the term “judicial officer” to include the office of a person presiding over a traditional or local court. The Commission thus recommends that the courts should remain courts of law as was the case under the now obsolete Traditional Courts Act.

The Commission also recognized that there will be a need to create a separate structure for the local courts parallel to the magistrate courts as part of the lower cadre of courts below the High Court due to the unique nature of local courts. Some participants at the National Workshop¹⁷ voiced dissatisfaction with the proposal and considered the introduction of the parallel structure a duplication in view of the anticipated criminal jurisdiction and the likely officers to preside. The Commission, however, could not see any duplication since the 4th grade Magistrate Courts shall phase out to accommodate the Local Courts. Further, the Local Courts are especially proposed to handle civil matters at customary law which have not been properly handled by magistrate courts.

¹³ Section 3.

¹⁴ Section 110 (3).

¹⁵ See the administrative functions of a chief under Section 7 of the Chiefs Act which include preservation of public peace, assisting in collection of tax, assisting in the general administration of the District and carrying out the traditional functions of his office.

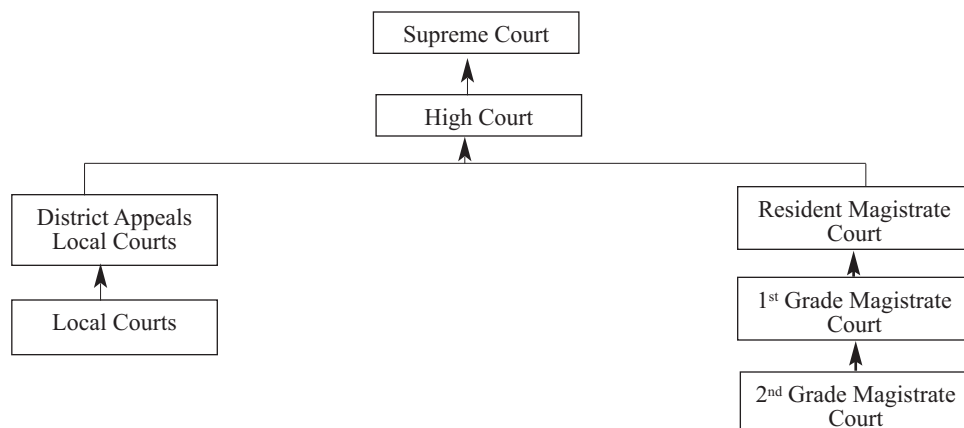
¹⁶ See Report of the workshop on the Review of Traditional Courts Act at page 20, where 14 responses to the questionnaire circulated at the workshop suggested that the courts should be courts of law, 8 suggested that they should be informal arbitration tribunals while as 2 people suggested that the courts should be formal tribunals.

¹⁷ This was held on 27th September, 2005 at Malawi Institute of Management

The Commission thus recommends that the new law should establish the Local Courts with an appellate structure at District level, then to the High Court and finally to the Supreme Court of Appeal. The lower cadre of local courts should in effect replace the present 4th Grade Magistrate Courts. Some participants at the National Workshop proposed the establishment of regional appeal courts so as not to saddle the High Court with appeals involving minor offences and small claims in civil customary matters. In reacting to this proposal the Commission considered that the creation of regional courts has the potential of creating a separate system of courts since the appeal hierarchy shall be lengthened and most people might not follow appeals through to the High Court. This may also have the disadvantage of suffocating jurisprudence since the court of first instance shall be far removed from the High Court. The Commission further recognized that the issue of workload of the High Court has two dimensions namely, administrative and judicial. Administrative handicaps may be influenced by inadequate resources to facilitate the smooth operations of the court. A strong lobby to get adequate funding is necessary. Judicial handicaps may largely be due to the competences of officers presiding over the lower courts. This can be avoided by improving on the quality of people to be appointed court chairperson in the Local Courts and intensifying continuous training of such officers.

Concerns were also expressed by stakeholders regarding the provision of an appellate court at District level in this law which was feared to create a parallel and independent system of courts. The Commission considered that providing an appellate structure within the system of local courts will not establish a parallel system of courts as the appellate court shall still be a court subordinate to the High Court. In debating the issue further, the Commission considered whether an Act of Parliament may create an appellate court as is envisaged in the proposals in this Report. The Commission took the view that the Constitution does not bar the establishment of an appellate court by an Act of Parliament so long as the appeal court does not have superior or concurrent jurisdiction with the High Court.

The Commission therefore recommends that at District level, the local court should be called a **“District Appeals Local Court”**. This court should be empowered to handle both appeals and reviews and it should employ District Administration Officers to provide administrative supervision of the lower courts.



3.2 *Presiding Officers*

Section 4 of the Traditional Courts Act provides that membership of a Traditional Court shall comprise a Chairman appointed by the Minister and such other members, if any, as the Minister may appoint. The appointees are required to sit with at least one assessor selected by the Chairman from the panel of assessors appointed by the Minister. On the other hand, the Constitution provides for lay persons or chiefs to preside over traditional or local courts. These are to serve as judicial officers and are to be appointed by the Chief Justice on recommendation of the Judicial Service Commission¹⁸.

The Commission considered three issues in dealing with the matter of presiding officers. Firstly was the issue of who should preside; should it be chiefs, laypersons or both? Secondly, at the proposed appellate court level, how many officers should preside? Thirdly, what should be the criteria for appointing and qualification of presiding officers?

The Commission observed that in the SADC Region, for example, in South Africa, Chiefs preside over customary courts while as in Lesotho and Zambia, lay persons preside over these courts. In Zambia the presiding officers are referred to as “court justices” and are appointed by the Judicial Service Commission from the local community on recommendation of a chief, in the case of a rural court. In urban areas vacant posts are advertised and candidates are short listed after conducting interviews (done by the Provincial Local Courts Officer) and submitted to the Judicial Service Commission. The presiding officers are usually experienced retired civil servants with pre-supposed good knowledge of customary law²⁰ of the area.

Having observed that at the regional level both chiefs and lay persons may preside over courts such as the proposed local courts, the Commission took the issue of presiding officers to stakeholders. There were mixed reactions from stakeholders on this issue. The people who contributed to the phone-in-programmes rejected the idea of chiefs as presiding officers for allegedly being easily corruptible and liable to bias²¹. At the initial Consultative Workshop the vote on the issue of presiding officers was split²². The survey carried out in the seven districts yielded inconclusive results²³.

The Commission was thus left with the task of determining the appropriate category of persons to preside over these courts given the permissiveness of the Constitution. To that end, the Commission considered a number of issues. The first one was the implication of the involvement of chiefs on the doctrine of separation of powers which promotes transparency and accountability among the three branches of government. In the current setting, chiefs are placed under the Minister of Local Government and are given executive functions under the Chiefs Act²⁴.

¹⁸ See section 111 (3) and (4) (e).

¹⁹ The involvement of chiefs has come under heavy criticism in that country that they may be a source of nepotism. On the other hand chiefs have the advantage of knowing their subjects and can vouch for their suitability and also their involvement may promote faith and confidence of traditional leaders in the court system.

²⁰ In this regard, see *Zambian Law Development Commission, Working Paper No. 6 of 1999* pages 17 and 18.

²¹ See page 3 of the Report of the Workshop on the review of the Traditional Courts Act.

²² 32% recommended lay persons, 32% recommended chiefs and 28% recommended both.

²³ 234 respondents favoured laymen, 524 respondents favoured chiefs and 558 respondents were for both chiefs and lay persons.

²⁴ See section 7 of that Act.

Thus, if any courts are established and are presided over by chiefs, it may result in the erosion of the independence of the Judiciary from the executive arm of Government. This will go against the spirit of the Constitution.

Secondly, the Commission considered that the involvement of Chiefs in the formal justice sector would have an adverse effect on their role in the informal dispute settlement mechanism referred to as “the non-state customary system of justice” which has always co-existed with and complemented the formal justice system since colonization. The Commission recognized that re-establishing these courts and excluding the Chiefs from the system will not rob chiefs of their traditional judicial functions as is feared from some quarters.

In order to adhere to the doctrine of separation of powers promoted by the Constitution and also to ensure that the informal justice system is not unnecessarily formalized, the Commission concluded that there is a clear need to demarcate between judicial functions and executive functions in this respect and recommends that the envisaged Local Courts should be presided over by “**lay persons**”²⁵. This shall ensure transparency and accountability in the management of the Local Courts and also the independence of the Local Courts.

The Commission also considered the appropriate number of presiding officers to sit on appeal in the District Appeals Local Courts. Different views were expressed on this matter. There was a suggestion that the presiding officer of this level of court should be a Resident Magistrate or a first grade magistrate in charge of the district. This view was supported by factors of convenience and cost effectiveness, since such officer is already employed by the Judiciary and is superior to a court chairperson.

The contrary view preferred other persons with knowledge of customary law as is the case in other jurisdictions such as Zambia and South Africa. The arguments in favour of this position focused on the ability of such persons to handle customary disputes and their familiarity with customary law of the relevant area. It was also considered that having such persons at the district level will create a career path for the officers in the lower courts.

In debating the matter further, the Commission conceded that magistrates are already overwhelmed with work and are handicapped in terms of applying customary law. The Commission was further aware that magistrates may sometimes be prejudiced in applying customary law due to ignorance and may bring their common law training approach to the province of customary law practice. Further, the Commission also saw the potential danger of magistrates looking down upon customary law thereby relegating it to second class law.

The Commission thus recommends that presiding officers should be persons with knowledge of customary law since the bulk of the work of the courts would focus on customary civil matters. The composition should therefore be similar to that of a local court, where one presiding officer shall sit. The Commission considered that the rationale for recommending one presiding officer on this court,

²⁵ This proposal was indorsed by the National Workshop which included chiefs as participants.

though it is an appeal court, is the need to achieve expeditious delivery of justice which may not obtain if more than one officer were to preside.

The Commission further recommends that the presiding officers should have the title “**Chairperson**”. The Commission was aware that this was the title used in the obsolete Traditional Courts but felt that since the term applies to the presiding officer of the Industrial Relations Court, it would also be appropriate for the Local Courts.

Further the Commission observed that the Traditional Courts Act is silent on criteria and qualification requirements for Traditional Courts members. The Commission considered that there should be basic guidelines in the law to determine suitability of prospective presiding officers. The Commission thus recommends the following—

- (a) a Malawi School Certificate of Education or its equivalent and able to read and write the English language well enough to enable him or her record court proceedings in the English language;**
- (b) adequate knowledge of customary law of the area;**
- (c) no criminal record involving dishonesty or moral turpitude;**
- (d) knowledge of the language commonly used in the area where the local court is established;**
- (e) a minimum age of 35 years²⁶;**
- (f) English proficiency;**
- (g) non-partisan;**
- (h) fit and proper person.**

3.3 *Assessors*

Section 4 of the Traditional Courts Act provides for the Chairman to sit with at least one assessor selected from a panel of assessors appointed by the Minister. The Commission considered a number of issues in this regard. Firstly, the Commission considered whether assessors should be allowed in the Local Courts and the level of court at which the assessors should be allowed. Secondly, the Commission considered the number of assessors that should be allowed to sit with the presiding officer. Finally, the Commission considered the issue of who should have authority to appoint the assessors and what qualifications such assessors should possess.

²⁶ In Zambia, it was pointed out in the Sunday Mail of July 1999 that the Judicial Service Commission should do away with the system of appointing persons of mature disposition as local court justices. It was observed that “ [grey] hair may not always be a sign of wisdom” and that “there is no person who could work well after working for over 30 years and beyond 65 years of age.

The issue of assessors attracted a lengthy debate. There was some view that instead of assessors, there should be allowed expert witnesses to give evidence on any sticky issue on customary law. In the end, the Commission agreed and recommends that assessors should sit with presiding officers in civil matters at customary law at all levels of the local courts hierarchy. Further, the presiding officer should have discretion on the need to sit with assessors and that the number of assessors should be limited to at least two assessors for each case.

The Commission further recommends that the functions of assessors should be two-fold: the giving of advice to the court in civil matters at customary law and that of monitoring seizures of property pursuant to sale orders, or transfer orders, as was the case under the obsolete Traditional Courts Act, to ensure transparency and accountability on the part of court staff in enforcing such orders.

Furthermore, the Commission recommends that the appointing authority for assessors should be the Registrar who shall be required to consult Traditional Authorities through the involvement of the magistrate of the District in appointing panels of assessors for each court. The Commission considered that such a process shall remove bias and favouritism in the appointment of assessors.

In terms of criteria and qualification, the Commission recommends that assessors should possess the same qualifications as court chairperson save for the minimum age of appointment which the Commission recommends to be 50 and the requirement that they should be able to read and write instead of having an education qualification. The Commission agreed on the two exceptions basically because assessors shall come in as experts at customary law and the proposed minimum age might enhance the chances of the chairpersons respecting views of assessors.

The Commission thus recommends adoption of the following provisions to provide for the establishment and constitution of Local Courts—

**Establishment
of Local
Courts**

There are hereby established the following Local Courts, subordinate to the High Court—

(a) the District Appeals Local Courts which shall be appellate courts established in each district; and

(b) Local Courts established at such places in the districts as the Chief Justice may determine.

Composition

(1) A Local Court shall consist of a Chairperson appointed by the Chief Justice on the recommendation of the Judicial Service Commission.

(2) The Chairperson may sit with at least two assessors selected from a panel of assessors appointed in accordance with this Act.

**Qualification
of Chairman**

A person shall qualify to be appointed as Chairperson of a District Appeals Local Court or a Local Court if such a person—

(a) is not less than thirty-five years old;

(b) is in possession of a Malawi School Certificate of Education or its equivalent and is able to speak and write the English language well enough to enable him or her record court proceedings in the English language;

(c) has adequate knowledge of the customary law of the area;

(d) has adequate command of the language commonly used in the area of jurisdiction of the Local Court;

(e) has no criminal record involving dishonesty or moral turpitude; and

(f) is otherwise a fit and proper person.

Court Staff (1) There shall be appointed, from time to time, in the Judicial Service court clerks and other support staff as may be required for the proper performance and exercise of the functions and powers of Local Courts.

Cap. 3:10 (2) Subject to the Judicature Administration Act and any rules made there under, the Chief Justice may, on recommendation of the Judicial Service Commission, terminate or authorize the termination of any appointment made under this section.

Assessors (1) In respect of every Local Court, the Registrar shall appoint a list of assessors consisting of persons who are qualified to serve as assessors and who shall be appointed on the recommendation of the Resident Magistrate of the District.

(2) An assessor shall not by virtue only of his or her appointment as an assessor be deemed to be an officer in the public service or holding a judicial office.

(3) In identifying assessors, the Resident Magistrate of the District shall be required to consult with Traditional Authorities in that district to ensure suitability of nominees.

(4) A person shall not be qualified to be appointed as assessor unless he or she—

(a) is fifty years old or more;

(b) is able to read and write;

(c) has adequate knowledge of customary law of the area;

(d) has adequate command of the language commonly used in the area where the local court is established;

(e) has no criminal record involving dishonesty or moral turpitude;

(f) is non-partisan; and

(g) is otherwise a fit and proper person.

(5) The Registrar may, from time to time, in accordance with such directions as may be given by the Chief Justice, vary the composition of any list of assessors appointed by him under this section.

Functions and
duties of
assessors

(1) The functions and duties of an assessor shall include the following—

(a) advise the court in civil matters at customary law on any point or points, but such advice shall not be binding on the court;

(b) monitor seizure of property pursuant to a sale order or transfer order issued under this Act.

(2) An assessor shall attend the Court to which he is appointed on such days and for such periods as the Chairperson shall from time to time direct.

4. JURISDICTION

Under the Traditional Courts Act, jurisdiction in civil and criminal matters is set out in the Establishment Warrant and is influenced by three factors, namely, subject matter (criminal or civil), territory and race²⁷. In terms of race, parties have to be Africans or in the case of a non-African, it must be shown that such person has voluntarily assumed a right, liability or relationship which is the subject matter of the dispute and which would be governed by the customary law concerned if all parties had been Africans. To complete the equation, the defendant must be resident or be within the jurisdiction of the court at the time when the cause of action arose. In the case of an accused person, he must have committed or been accessory to the commission of an offence wholly or in part within the jurisdiction of the court.

The Commission observed that the Constitution limits the jurisdiction of traditional or local courts exclusively to “civil cases at customary law and such minor common law and statutory offences as prescribed by an Act of Parliament”²⁸. The Commission further observed that the Constitution has limited itself to the subject matter in determining jurisdiction without giving guidance on other factors that usually influence jurisdiction such as the geographical area and the people to use the courts. The Commission thus had to grapple with a number of issues such as, should jurisdiction of these courts be limited territorially; should jurisdiction be guided by the subject matter only; furthermore, should jurisdiction be determined by monetary considerations?

²⁷ Sections 8, 9, 10 and 11 of the Act.

²⁸ See section 110 (3).

After a lengthy debate, the Commission concluded that jurisdiction of local courts should be “**local**” as the law to be administered shall be the customary law of the area. The Commission however agreed to discuss the issue of civil and criminal jurisdiction separately.

In concluding the debate on jurisdiction, the Commission considered empowering Local Courts with powers of transfer of a case to another Local Court where the Local Court lacks jurisdiction. The Commission observed that this issue may affect the right of access to justice of an aggrieved person where the other Local Court may be miles away. The Commission thus debated the advantage of requiring the Local Court to advise such party of his choices, namely, whether indeed to have the case transferred to another Local Court with jurisdiction or to have the case transferred to a magistrate court. The Commission however conceded that such an approach may work to deprive the court of its inherent power to use discretion in such matters and recommends that a Local Court should be empowered to exercise powers of transfer to another Local Court and that in such cases the Local court should use its discretion. The Commission thus recommends adoption of the following provision—

Transfer of case
to another Local
Court before
inquiry or trial
and transfer and
trial to another

(1) Where a person appears before a Local Court, the Local Court—

(a) shall, if satisfied that it has no jurisdiction to try or inquire into the case; or

(b) may, if it is of the opinion that the case should be tried by or inquired into by another Local Court,

direct that the case be adjourned and transferred to any Local Court which is competent to try or inquire into the case.

4.1 *Civil Jurisdiction*

According to the Note on Establishment and Areas of Jurisdiction of Traditional Courts promulgated under the Traditional Courts Act, the civil jurisdiction in matters to be determined according to customary law is unlimited. In all other civil matters, it is limited to causes in which the subject matter in dispute does not exceed K300. The Commission however observed that the Constitution under section 110 (3) has restricted jurisdiction of Local Courts in civil matters only to civil cases at customary law. Further, there is no monetary ceiling regarding the subject matter of the dispute. The Commission thus recommends that the jurisdiction of these courts in civil matters at customary law should be as provided in the Constitution.

However, basing on the findings of the initial consultative workshop, the Commission recommends that some matters, though properly falling under customary law should be excluded from the jurisdiction of local courts. The Commission thus recognizes that issues such as “inheritance” are volatile and complex and that there is usually gender bias in handling such issues.

The Commission also indorses the recommendation from that workshop that Local Courts should not have jurisdiction over land disputes. This position was taken principally because the Land Policy adopted by Government in 2001 advocates for the settlement of land disputes through Land Tribunals to be established under land legislation. Thus, matters of use and ownership of property on such land should equally be handled by the same Tribunals though customary law distinguishes between land and immoveable property on such land²⁹.

The Commission disagreed with the recommendation of the workshop to remove the issue of “distribution of matrimonial property” from the jurisdiction of Local Courts. The Commission considered that since Local Courts shall have jurisdiction over customary marriages, then it logically follows that the same courts should exercise jurisdiction over distribution of matrimonial property on termination of marriages celebrated under customary law.

However, issues of custody of children on dissolution of marriage were considered inappropriate to be handled by the local courts because at custom this is pre-determined and does not take into account the “best interest of the child” as enunciated in the Convention on the Rights of the Child to which Malawi is a party. The Commission thus recommends that Local Courts should not have jurisdiction over such issues.

4.2 *Criminal Jurisdiction*

Public opinion as discerned from the initial consultative workshop was in favour of removing criminal jurisdiction from Local Courts. This was principally due to the high standards that the Constitution has set in terms of the conduct of the criminal process starting from investigations to trial. Stakeholders did not have confidence in Local Courts to live up to the standards set by the Constitution. Stakeholders were also informed that the lower magistrate courts do not handle many criminal cases but rather deal with civil cases mostly. This scenario was also considered as a factor to remove criminal jurisdiction from local courts.

Other arguments focused on the specialized nature of Local Courts which are geared to deal with matters of custom and hence not appropriately suitable to deal with criminal matters. It was therefore argued that a comprehensive legal framework to deal with criminal matters is already in place and the review should focus on addressing the present existing gap to deal with customary matters.

With this background in mind, the Commission considered whether, given the constitutional language, it would be possible not to grant criminal jurisdiction to Local Courts. After a lengthy debate, the Commission concluded that the wording of section 110 (3) is permissive and gives Parliament discretion on the setting up and jurisdiction of traditional or local Courts. The Commission was also made aware that the original draft of the Constitution did not include criminal jurisdiction for traditional or local courts but rather that this was inserted at a later stage in the drafting process. The original intention was that such courts should exercise jurisdiction in civil matters at customary law only.

²⁹ Under English Law there is no distinction between land and immoveable property on such land ie see Garner and also Blacks Law Dictionary.

The Commission however agreed that this original intention should be ignored since the Constitution has made provision for both civil and criminal jurisdiction for traditional or local courts. The Commission further considered that personnel of Local Courts, if properly qualified and trained should be able to exercise diligence in criminal matters and live up to the standards set by the Constitution.

However, the Commission was aware that the issue of criminal jurisdiction of Local Courts needs to be tackled together with the issue of prosecutors. The pertinent issue was whether indeed there would be enough prosecutors to carry out criminal prosecutions in Local Courts. The Commission conceded that there shall be need for the Police Service to train enough prosecutors to take up criminal cases in these courts and that this shall require the provision of adequate resources to the Police Service. The Commission nonetheless considered that lack of adequate prosecutors cannot be a reason to remove criminal jurisdiction from Local Courts since this is an issue to be dealt with at administrative level.

In reacting to the Commission's position on this matter, participants at the National Workshop were dissatisfied and emphasized that the reporting of all offences including common assaults to Police completely prevents any efforts at reconciliation on the part of the offender and the victim thereby killing one of the best attributes of the customary law dispute settlement mechanism. In responding to this issue the Commission considered section 161 of the Criminal Procedure and Evidence Code which encourages the promotion of reconciliation in such cases or any other offences of a private nature and recommends that the section should be adopted and introduced in the new law on local courts.

A consequential question that the Commission considered was the present lack of maximum utilization of 3rd and 4th Grade Magistrate Courts which have replaced Grade A and B Traditional Courts regarding criminal matter.

The Commission was aware that out of the 197 magistrate courts which replaced these Traditional courts only 94 are functional³⁰. This position is an indication of the unworkability of the present arrangements. The Commission also considered that the minimum utilization of the magistrate courts in these areas may be due to unfamiliarity with the procedures and the attendant costs. Recognising that the Local Courts shall be the only courts which shall be very close to the ordinary Malawian, the Commission saw the need to confer appropriate jurisdiction in criminal matters which shall ensure the dispensation of criminal justice at that level. Further, proper training for court officers and availability of separate rules for criminal and civil procedures shall ensure the proper handling of criminal matters as opposed to the confusion which reigned in the defunct Traditional Courts.

In the end, the Commission concluded that giving local courts criminal jurisdiction would not dilute the standard of justice set by the Constitution as is feared in some quarters. The Commission thus recommends that Local Courts should have jurisdiction in criminal matters and proposes that the matters to be handled by Local Courts in this regard should be set out in a Schedule to the Act.

³⁰ See survey conducted by the Judiciary in this regard.

The Commission also proceeded to discuss the criminal jurisdiction of Local Courts as provided by the Constitution and considered that there are no common law offences in Malawi in view of the codification of penal law. The Commission thus concluded that reference to common law offences in the Constitution is erroneous and recommends on the forthcoming constitutional review exercise should correct this error.

In terms of sentencing, the Commission observed that the Traditional Courts Act limits the sentencing jurisdiction for the lower cadre of Traditional Courts to 12 months imprisonment³¹. The Commission was however aware that recent legislation such as the Environment Management Act³² and the Forestry Act³³ which create statutory offences has exorbitant fines of up to MK1,000,000 for offences which were previously regarded as minor statutory offences and thus attracting terms of imprisonment of up to twelve months. The Commission considered that it will be tricky to determine which statutory offences are minor in view of this development.

In debating this issue further, the Commission considered that the weight of the offence should be the guiding factor as to whether a Local Court should have jurisdiction or not³⁴.

Further, the Commission considered that the sentencing powers of the courts should be those under section 25 of the Penal Code³⁵ except for forfeiture, death and corporal punishment.

However, participants at the initial consultative workshop were opposed to the idea of Local Courts imposing custodial sentences. This position was influenced by the fact that the Local Courts are anticipated to be primary courts handling very simple matters. The Commission was further advised that current penal policy requires that any term of up to twelve months imprisonment should be converted to community service so as to decongest the prisons.

In considering the recommendations of the initial consultative workshop regarding the issue of custodial sentences by local courts, the Commission drew lessons from other jurisdictions in the region, notably, South Africa, where there is a move to shift the sentencing powers of customary courts. Thus, in that jurisdiction it is suggested that a customary court should be able to pass sentence but order that the operation of the whole or any part of the sentence be suspended for a period not exceeding three years subject to any conditions specified by a court³⁶.

³¹ Grade A and Grade B Traditional Courts.

³² Cap 60:02 of the Laws of Malawi.

³³ Cap 63:01 of the Laws of Malawi.

³⁴ Views of stakeholders at the initial consultative workshop varied. Some suggested restriction to minor strict liability offences not demanding proof of men's rea, others preferred only petty offences while as another category was completely opposed to the idea of local courts handling criminal matters.

³⁵ Cap 7:01 of the Laws of Malawi.

³⁶ See South African Law Commission Report on Traditional Courts and the Judicial Function of Traditional Leaders at page 45.

Notwithstanding the above, the Commission concluded that there is still need for Local Courts to have powers of imprisonment as reserve powers. Such imprisonment should however not exceed twelve months. Where the case warrants the imposition of a longer sentence then the Local Courts shall remit the matter to the court of a 2nd grade Magistrate. The preference for 2nd grade Magistrate was influenced by the fact that the 3rd grade Magistrate shall be the entry level court and may not have adequate jurisdiction. The Commission further, as a compromise, recommends that any imprisonment imposed by a Local Court should immediately convert to community service except where the circumstances warrant a custodial sentence.

The Commission also recommends that Local Courts should be able to impose fines up to a maximum of K5,000 which should also convert to community service where there is default. Where the person deserves a higher fine, the Local Court should remit the matter to a 2nd Grade Magistrate Court for sentencing. The preference for this Court was based on the same reasoning as indicated previously.

The Commission also agreed with the initial consultative workshop recommendation to exclude jurisdiction of local courts in matters of witchcraft. The Commission considered that by their very nature, such matters might be abused and result in victimization of innocent people and unnecessary encroachment on peoples rights.

The Commission thus recommends adoption of the following provisions—

General jurisdiction	Subject to this Act or any other written law for the time being in force, a Local Court shall have and may exercise jurisdiction within the area of its locality.
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Places and time of sittings of Local Courts	The sittings of Local Courts shall ordinarily be held in sittings of such places as the Chief Justice may direct in the local jurisdiction of such courts, at such times as the Chairperson convening the court may deem most adapted to facilitate the business of the court.
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Civil jurisdiction Local Court	(1) Subject to this Act or any other written law, a Local Court shall have and may exercise jurisdiction over civil cases at customary law.
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(2) Notwithstanding subsection (1), no Local Court shall have jurisdiction to deal with, try determine any civil case at customary law—

(a) whenever the title or ownership of customary land is in question;

(b) relating to inheritance of deceased property;

(c) wherein the guardianship or custody of infants is in question; and

Cap. 7:02

(d) relating to issues of witchcraft under the Witchcraft Act.

Awards in cases of a civil nature

(1) A Local Court may, in cases of a civil nature—

(a) award compensation, which may include an amount for costs and expenses incurred by a successful party or his witnesses;

(a) order the restitution of any property;

(b) order the specific performance of any contract at customary law;

(c) make any other order which the justice of the case may require.

(2) An award of compensation or other order under subsection (1) may provide for—

(a) payment in money or in kind;

(b) the time or times for making payment or doing any other act;

(c) payment by installments;

(d) any other manner of compliance therewith as the Court may think just.

Criminal jurisdiction of Local Courts

Subject to this Act or any other written law, a Local Court shall have and may exercise criminal jurisdiction in such minor offences under the Penal Code and in any other written law as prescribed in the First Schedule.

Orders in cases of a criminal nature

(1) Subject to this Act or any other written law, a Local Court may in cases of a criminal nature pass any of the following sentences authorized by law—

(a) community service;

(b) fine not exceeding K5,000;

(c) payment of compensation;

(d) finding security to keep the peace and be of good behaviour;

(e) forfeiture, where it is provided for in an Act of Parliament;

(f) imprisonment:

Provided that no sentence of imprisonment shall be imposed except in cases with aggravated circumstances or for repeat offenders and that such sentence shall not exceed a period of twelve months.

(2) A Local Court may pass any sentence combining any of the sentences specified in subsection (1) (b) to (c).

(3) A Local Court may impose a fine only where it is probable that the accused can afford to pay the fine and in such case the court may order that any fine which it shall impose shall be paid at such time or times or by such instalments or in kind or otherwise as it shall think just.

(4) Where a Local Court makes an order for the payment of a fine, it shall have the power to direct by its sentence that in default of the payment of the fine the order should convert to community service as will satisfy the justice of the case.

(5) The order of community service imposed by a Local Court in default of payment of a fine shall terminate whenever the fine is paid.

(6) When a person is convicted of any offence, a Local Court may, instead of passing sentence under subsection (1), order such person to enter into a bond, with or without sureties in such amount as the court thinks fit, that he shall keep the peace and be of good behaviour for a time to be fixed by the court, and sections 123, 125 and 341 of the Criminal Procedure and Evidence Code shall apply *mutatis mutandis* to any bond entered into under this section.

Cap. 8:01

Power to
release and
caution by
Local Courts

Notwithstanding section ..., where in any trial a Local Court thinks that the charge is proved but is of the opinion that, having regard to the character, antecedents, age, health or mental condition of the accused, or to the trivial nature of the offence, or to the extenuating circumstances in which the offence was committed, it is inexpedient to inflict any punishment, the court may, without proceeding to conviction, make an order dismissing the charge, after such admonition or caution to the offender as the court deems fit.

Promotion of
reconciliation

In cases of common assault or any offence of a private nature not amounting to a felony, a Local Court may encourage the amicable settlement of the matter on terms of payment of compensation or other terms approved by the Court and may thereupon order proceedings to be stayed or terminated.

Compensation
to injured or
aggrieved
persons

(1) Where a Local Court convicts any person, it may, in addition to any other punishment, or in substitution for any other punishment other than one fixed by law, adjudge that such person pay reasonable compensation to, or to any

member of the family of, any person injured by the act or omission in respect of which such conviction was made.

(2) Any compensation awarded by a Local Court under this section may be ordered to be paid at such time or times or by such instalments as it shall think just.

(3) Where a convicted person defaults in the payment of any compensation or any instalments of the same when due, the court may order that the amount of the compensation or the instalment, as the case may be, shall be levied by the sale of any property belonging to the convicted person.

Places of
imprisonment
Cap. 9:02

Every person sentenced by a Local Court to imprisonment or taken in the execution of the process of such court shall be detained in a place authorized under the Prisons Act for that purpose.

5. PRACTICE AND PROCEDURE

Section 23 of the Act provides that the practice and procedure of Traditional Courts shall be regulated in accordance with such rules as may be made in that behalf by the Minister. To that end, section 40 which confers the rule making power on the Minister requires the Minister to provide for, among other things, the practice and procedure of Traditional Courts in their original and appellate jurisdiction, the procedure relating to the institution of criminal and civil proceedings, the practice relating to the arrest of accused persons, the practice relating to remand of accused persons, the provisions relating to bail and the procedure relating to institution of appeals. Pursuant to this rule making power, the Minister promulgated the “Traditional Courts (Procedure) Rules which provide for the mode of commencing both civil and criminal matters in Traditional Courts up to trial and conclusion of a matter.

Two issues emerged in deliberating this provision. First, the special Law Commission considered that the rules of practice and procedure for any courts should be properly be made by the Chief Justice as opposed to the Minister. The Commission thus recommended that the rule making power in this regard should be conferred on the Chief Justice. Secondly, the special Commission observed that the Traditional Courts (Procedure) Rules do not differentiate the mode of commencing criminal and civil matters. This was found to be a major weakness in view of the constitutional position which entrusts the power of instituting and undertaking of criminal proceedings against any person with the Director of Public Prosecutions unless he or she directs otherwise.

Firstly, the Commission recommends amendment to section 23 as follows to provide for situations where the rules may not be adequate—

Practices and
procedure

14. The practice and procedure of Local Courts shall be in accordance with this Act and any rules made there under:

Provided that if this Act or any rules made thereunder does not make provision for any particular point of practice and procedure then the practice and procedure of Local Courts shall be—

(a) in relation to criminal matters, in accordance with the Criminal Procedure and Evidence Code; and

(b) in relation to civil matters, as nearly as may be in accordance with the practice for the time being applied by magistrate courts.

The Commission further carried out a detailed analysis of the rules and recommends adoption of two separate sets of new rules to provide for civil and criminal proceedings to comply with the constitutional standards regarding the latter. The report on the detailed analysis of the Rules and the recommended new rules forms part of this Report.

Another important aspect which the Commission considered under this heading was the issue of language. The Commission noted that under the Traditional Courts (Procedure) Rules the Minister was empowered to approve the language or languages in which the records of each court were to be kept. The Commission considered that this position would be unsatisfactory in the proposed hierarchy arrangements for Local Courts which shall see appeals lying all the way to the Supreme Court where the English language is the language for court records. The Commission however recognized the importance of allowing the use of the vernacular language of the area in such courts in court proceedings as a way of enhancing access to the Local Courts. The Commission thus recommends that the vernacular language should be used in proceedings to facilitate easy participation and understanding but that the presiding officer should be required to personally record the proceedings in the English language.

The Commission also considered the importance of guiding the Local Courts in terms of the manner in which they should record court proceedings and recommends that it should be in the form of a narrative.

The Commission thus recommends adoption of the following new provision—

**Language of
court**

(1) In any civil or criminal proceedings, a Local Court shall use the language of the court as may be approved by Chief Justice.

(2) Notwithstanding subsection (1), the Chairperson of the Local Court shall personally record the proceedings in the English language and shall record the evidence of the witnesses in the form of a narrative:

Provided that the Chairperson may, in his discretion, take down or cause to be taken down any particular question and answer.

The Commission was also aware that a glossary of often used legal terms has been developed and translated into some local languages by the Judiciary. Furthermore, there is a Chichewa version of the Criminal Procedure and Evidence Code. The Commission recommends that the Judiciary should source these two documents and distribute them widely once the courts become operational, as they would prove invaluable to the operation of these Local Courts.

6. LEGAL REPRESENTATION

Section 24 of the Traditional Courts Act prohibits legal representation in Traditional Courts unless the Minister authorizes such representation by order in writing in respect of proceedings before the court concerned either generally or in any particular case or class of case³⁷. The Minister, through the Traditional Courts (Appearance by Legal Practitioners) Order allowed legal practitioners to appear at the discretion of presiding officers in District Traditional Courts in all proceedings other than matters to be tried solely in accordance with customary law. Legal Practitioners were also allowed to appear in certain courts listed in the Order other than District Traditional Courts in all criminal matters.

The special Commission recognized that legal representation in criminal matters is a constitutional right under section 42 of the Constitution which gives “every person who is detained, including every sentenced prisoner, the right to consult with and to be represented by a legal practitioner and to be informed of this right promptly”. However, the right is not absolute. The position is however different for civil matters since the legal representation in such matters is not a constitutional issue. The Commission was thus left to determine whether legal representation should be allowed in both civil and criminal matters.

The Commission was aware that civil matters to be handled by these courts shall be confined to those at customary law. The Commission considered that the competence of legal practitioners in customary law is limited due to their training background. Further, in the defunct Traditional Courts legal representation was not allowed for obvious reasons. The Commission thus recommends that this position should be retained in civil matters.

In discussing the issue of legal representation in relation to criminal matters, the Commission proceeded on the basis that the right to legal representation in such matters is equivalent to the “right to equality and recognition before the law” which is non-derogable under section 44 of the Constitution.

In other jurisdictions in the region such as South Africa where the Constitution has similar provision on legal representation and a similar provision on non-derogable rights, reforms to the customary courts have proceeded on the basis that the right to legal representation is not absolute and may be restricted in appropriate cases. In South Africa the general public rejected the introduction of legal representation in customary courts on the basis that “the principal reason for engaging legal professionals is to benefit from their advice on how to pursue rights

³⁷ This is the position in most African countries where traditional or local courts are found. See South African Law Commission Report on Traditional Courts and the Judicial function of Traditional leaders at page 22.

in a complex, and for the litigant, inaccessible legal system³⁸. To that end, the policy of excluding legal practitioners from customary courts handling civil claims and minor criminal offences was thus considered reasonable on the understanding that the users of the courts are familiar with their own system³⁹ and the system itself is largely accessible. In order to reach a compromise and also to satisfy the conditions set by the Constitution in limiting a right of this nature, proposals were made for representation in accordance with customary law. Thus, by implication legal practitioners are excluded since they are not known to customary law. Further, since customary law does not distinguish among spokespersons as to whether they are legally qualified or not, it is theoretically possible for a person with legal qualifications to appear in such courts as spokesperson for one of the parties⁴⁰.

In the neighbouring Zambia where reforms to the Local Courts Act have been proposed recently⁴¹, it was found out through research that there is practically no legal representation in Local Courts though such representation is allowed in criminal matters⁴².

In the survey conducted by the Commission in the seven districts, the predominant view was that legal representation should generally not be allowed in these courts⁴³. Similarly, the majority of the participants at the initial consultative workshop were against legal representation principally because of the nature of the procedures in these courts which are simplified and the matters handled by such courts which are usually simple and do not need complicated legal arguments. Similarly, some writers have emphasized the consideration that the users of these courts are normally poor and cannot afford lawyers fees which might result in prejudicing a poor litigant confronting a wealthy opponent in civil matters at customary law.⁴⁴ In short, rejection of legal practitioners is premised on the fear that allowing such representation shall irrevocably change the very nature of conducting business in traditional or local courts and rob the system of customary dispute resolution mechanism of many of its virtues which include expeditiousness, flexibility and simplicity especially in relation to civil matters at customary law.

The Commission took note of the findings from the survey and the workshop and also of developments in the region but considered that the right to legal representation in criminal matters is arguably non-derogable.⁴⁵ The Commission further observed that the presiding officers shall have the same training as lay magistrates to enable them to competently handle legal practitioners in their courts. Furthermore, the Commission considered that the practicalities of these courts would make it difficult for lawyers to appear rather than barring them outright.

³⁸ See the case of *Yates v University of Bophuthatswana and others*, 1994 (3) SA 815 (B) at 846.

³⁹ T.W. Bennett, *Human Rights and African Customary Law*, 1995, at page 79

⁴⁰ *Ibid* at page 24.

⁴¹ The present position is that legal representation is only allowed in criminal matters.

⁴² Zambia Law Development Commission Working Paper No. 6 of 1999 on the Review of the Local Courts Act. 957 out of the 1,364 were against legal representation.

⁴⁴ In this connection, see Bennet at Pages 78-79

⁴⁵ Note that under section 73 of the Labour Relations Act, 1996 legal representation is allowed with leave of the court.

The Commission thus recommends that legal representation should be allowed in criminal matters before these courts.

7. REPRESENTATION BY OTHERS

Section 24 (2) of the Traditional Courts Act permits representation by husband, wife, guardian, any servant or master of any plaintiff or defendant. The Commission observed that at custom, the practice is that the kind of matter dictates the nature of representation on behalf of a person. Thus, in other societies, “adult males are expected to know the law and the judicial procedures of their people; only women and juniors need assistance to present their cases”⁴⁶.

The Commission found the practice of representing adult women in proceedings before these courts unsatisfactory and oppressive and recommends that women should have discretion in such matters as to whether to be represented or not to uphold the principle of gender equality before the law.

The Commission also considered the extent to which para-legals should be involved in proceedings before Local Courts. The Commission thus took this issue to participants at the Initial Consultative where participants were amenable to the involvement of para-legals in proceedings in these courts. It was considered that para-legals may provide a simplified version of legal aid and may assist in enhancing the efficiency and effectiveness of these courts⁴⁷.

However when this issue was taken to the grassroots, the responses in the survey carried out in the seven districts indicated the contrary. A total of 1,034 respondents were against representation by others including para-legals. The Commission however realized that the response to the involvement of others was negative because the issue was not put properly in the questionnaire. The Commission thus took the view that the customary practice of being represented by family members cannot be dispensed with and recommends that the current practice of being represented by others recognized by custom should continue.

The Commission further considered that the involvement of para-legals in these courts as “para-legals” might open up the courts to undesirable practices⁴⁸. The Commission thus recommends that para-legals should appear in these courts as a “next friend”⁴⁹ and that the appearance of para-legals should be *gratis*.

8. LAWS TO BE ADMINISTERED

Section 12 of the Act empowers Traditional Courts to administer the provisions of any Act if so authorized by the Minister, rules, orders, regulations or by-laws made under the Local Government (District Councils) Act in force in the area of jurisdiction of the court and the customary law prevailing in the jurisdiction of the court. Further, criminal proceedings are restricted to offences constituted under an Act or under any rule, regulation, order or by-law made thereunder.

⁴⁶ Bennett Ibid at page 78.

⁴⁷ See the Report of the Workshop on the Review of the Traditional Courts Act at page 24.

⁴⁸ Such as the opening up of illegal legal firms to the detriment of the users.

⁴⁹ Similar to the position in the Industrial Relations Court.

The Constitution requires local courts to administer customary law in relation to applicable civil cases and statutory law in relation to criminal offences as prescribed by an Act of Parliament.

The Commission considered this issue in connection with customary law which is quite diverse in Malawi. The Commission recommends that these courts should apply customary law of the geographical area in which the court is situated as was the case for the defunct Traditional Courts⁵⁰.

In terms of criminal matters, the Commission recommends that the Local Courts should apply only those statutes as may be prescribed in a Schedule. To that end, the Commission has reviewed the Traditional Courts (Criminal Jurisdiction) Order and recommends that it should be turned into a Schedule to the new law.

Further, the Commission considered whether these Local Courts should have power to interpret human rights issues and the Constitution. The Commission was aware that the Constitution under section 11 gives power to courts to interpret the Constitution and human rights issues without discriminating on the nature of court. The Commission was further aware that in relation to subordinate courts, the Constitution has detailed out the jurisdiction to be conferred in certain instances. For example, in the case of the Industrial Relations Court, the jurisdiction is confined to labour disputes and matters relating to employment.

The Commission thus considers that Local Courts should have regard to constitutional and human rights issues when handling matters before them. The Commission was however aware that the presiding officers would have to be very conversant with human rights issues and therefore placed emphasis on the need for training of these presiding officers in human rights and constitutional issues.

The Commission thus recommends adoption of the following provision—

Laws to be
administered

Subject to this Act, a Local Court shall administer—

(a) the customary law prevailing in the area of jurisdiction of the Local Court in relation to applicable civil matters, so far as it is not inconsistent with the Constitution or any other written law in force in Malawi;

(b) the provisions of any Act which the Court is authorized to administer by or under this Act or such Act;

Cap. 22:01

(c) the provisions of all rules, orders, regulations or by-laws made under the Local Government Act and in force in the area of jurisdiction of the Court:

Provided that—

(i) no criminal proceedings shall be taken and no criminal penalty imposed otherwise than in respect of an offence constituted under an Act or under any rule, regulation, order or by-law made thereunder;

⁵⁰Participants at the Initial Consultative Workshop made a similar recommendation.

**(ii) due regard shall be given to the provisions of the
Constitution in applying any customary or statutory law.**

9. REVIEW AND SUPERVISION

Having determined the hierarchy of local courts, the special Commission was faced with the challenge of establishing effective review and supervision mechanisms for the lower cadre of local courts.

The Commission observed that in the current law, the power of review and supervision is entrusted with the Traditional Courts Commissioner who carried out this responsibility at an administrative level⁵¹. The Traditional Courts Commissioner is thus empowered to have access to the records of Traditional Courts and on application of the court or any person concerned or on his own motion, to order a retrial or transfer, to vary a judgment or set aside a sentence in order.

In carrying out this function in the defunct Traditional Courts, the Commissioner was assisted by District Traditional Courts Officers who frequented Traditional Courts for the purpose of collecting records where appropriate. The Commission found this position to be unsatisfactory and tantamount to the usurpation of judicial functions by an Executive officer.

Consequently, in determining the issue of reviews and supervision, the Commission had to grapple with two pertinent issues. The first issue to resolve was that of the appropriate court in the proposed hierarchy to be entrusted with the power of review and supervision. The second issue was to determine whether the power of review should be extended to both criminal and civil matters.

In dealing with the first issue, the Commission considered that the logical choice of court to exercise such powers should be the District Appeals Local Court. The Commission recommends that this court should be granted general supervisory powers over local courts similar to those granted to the High Court over all subordinate courts under section 26 of the Courts Act. The Commission arrived at this decision for two reasons. The first one was that the District Appeals Local Court shall be a promotional court for officers from the Local Courts and shall therefore ensure familiarity and availability of adequate experience in handling matters from lower courts. Secondly, it was considered that this court may provide a sieving station for most petty matters emanating from the lower Local Courts which may lessen the workload of the already overburdened High Court.

In determining the question of the extent of the power of review as posed by the second issue, the Commission considered that it would be in the interest of justice that this power extends to both criminal and civil matters for a number of reasons. Firstly, it was conceded that a lot of mistakes are bound to occur during the initial years of establishing the courts. This realization in itself calls for an appropriate and effective review and supervision mechanisms to ensure correction of the mistakes in both civil and criminal matters. This will also give presiding officers an opportunity to learn.

⁵¹ See section 32 of the Act.

Secondly, the Commission considered that an effective review mechanism will promote high standards on presiding officers in terms of case management as the pressure to comply with minimum standards shall be high. Thirdly, it was the view of the Commission that an effective review and supervision mechanism will promote transparency of and accountability for judicial decisions.

Lastly, the Commission considered that most aggrieved parties in civil matters are unlikely to utilize their right to appeal due to illiteracy, expense and time. Thus, a general power of review and supervision will provide a solution to such parties.

The Commission however recognized that for the efficacy of implementing this recommendation, there shall be a need to put in place appropriate administrative arrangements to implement the work previously done by the District Traditional Courts Officers. To that effect the Commission recommends adoption of the following provisions—

**General
supervisory
powers of
District
Appeals
Local Courts**

(1) A District Appeals Local Court shall have general supervisory and revisionary jurisdiction over all local courts powers of within its jurisdiction and may, in particular, but without District Appeals prejudice to the generality of the foregoing provision, if it appears desirable in the interests of justice, either of its own motion or at the instance of any party or person interested at any stage in any matter or proceeding, whether civil or criminal, call for the record thereof or may give such Local Court such directions as to the further conduct of the same as justice may require.

(2) Upon the District Appeals Local Court calling for any record under subsection (1), the matter or proceeding in question shall be stayed in the local court pending the further order of the District Appeals Local Court.

10. APPEAL

Section 40 of the Traditional Courts Act empowers the Minister to make rules to provide for the practice and procedure of Traditional Courts in their original and appellate jurisdiction. Pursuant to this power, the Minister promulgated the Traditional Courts (Appeals) Rules. These Rules only provide for appeals to Traditional Appeals Courts established by warrant under section 33 of the Act.

Before the separation and creation of a parallel legal system to the High Court, the Traditional Courts (Appeals to the High Court) Rules, a separate set of rules promulgated under section 67 of the Courts Act provided for appeals from Traditional Appeal Courts, Urban Traditional Courts and Grade A.1. Traditional Courts to the High Court.

After a detailed analysis of the two sets of Rules as indicated in this Report, the Commission recommends adoption of a new set of Rules which shall combine both Rules and to be titled Local Courts (Appeals) Rules. The proposed new Rules form part of this Report.

11. ENFORCEMENT OF JUDGEMENTS

Section 17 (3) of the Traditional Courts Act provides for enforcement mechanisms where there is default in the performance of or compliance with an award of a civil nature.

The Commission observed that the provisions on enforcement of judgements are embedded in a section which principally deals with awards in civil matters. The Commission considered that this arrangement fails to highlight the importance of the issue of enforcement of awards where there is default. The Commission recognized the need to highlight this issue in a stand alone provision to indicate availability of effective remedies and recommends accordingly. To that end, the Commission recommends that the provision should be split into two and subsection (3) to become a stand alone provision to read as follows—

(2) In case of any default in the performance of or compliance with an award or other order in accordance with the terms thereof, the Court may order—

(a) that any property, referred to in an order for restitution or an order for specific performance of a contract or other order for delivery or transfer of property, may be seized and transferred to the person entitled to receive it;

(b) that payment of any sum of money due be enforced by the seizure of any property belonging to the person ordered to make the payment and—

(i) by the sale thereof; or

(ii) the transfer thereof to the person entitled to receive the payment at a value fixed by the Court;

(c) that the payment of compensation in kind be enforced by the seizure of property of that kind belonging to the person ordered to pay the compensation and the transfer thereof to the person entitled to receive the compensation.

Further, the Minister promulgated the Traditional Courts (Enforcement of Judgements) Rules pursuant to section 40 to provide for procedures to be followed in implementing this provision. The Commission carried out a detailed analysis of the Rules, recommending revocation and adoption of new rules to regulate enforcement of judgments. The Commission further recommends that these rules should be made by the Chief Justice. The new Rules are attached to this Report.

[SUBSIDIARY LEGISLATION]

TRADITIONAL COURTS (CRIMINAL JURISDICTION) ORDER

Under s.13

This Order was made under section 13 of the Traditional Courts Act. The Commission considered whether it would be necessary to clearly spell out the criminal jurisdiction of the Local Courts as had been done for Traditional Courts under this Order. The Commission resolved that indeed criminal jurisdiction for Local Courts should be spelt out to ensure convenience for users and that this should be contained in a Schedule to the main Act. The Commission then proceeded to consider the jurisdiction accorded to Grade A and Grade B Traditional Courts under the Order to determine whether this jurisdiction should be retained.

1. PENAL CODE CAP. 7:01

SECTION 47 (2) only [*Offences in relation to publications, importation of which is prohibited*]

RETAINED.

SECTION 60 [*Publication of false news likely to cause fear and alarm to the public*]

RETAINED.

SECTION 71 [*Unlawful assembly*]

Retained.

SECTION 81 [*Prohibition of carrying offensive weapons without lawful authority or reasonable excuse*]

The Commission was of the view that Local Courts should have jurisdiction to try offences under this section as this would help to check the proliferation of offensive weapons in society. The Commission recommends accordingly.

SECTION 84 [*Fighting in public*]

The Commission observed that this is a minor and common offence and recommends that Local Courts should have jurisdiction to try offences under this section.

SECTION 85 [*Challenging to fight a duel*]

RETAINED.

SECTION 88 (1) (A) and (1) (B) only [*Intimidation*]

RETAINED.

SECTION 107 [*Deceiving witnesses*]

RETAINED.

SECTION 108 [*Destroying evidence*]

RETAINED.

SECTION 113 [*Offences relating to judicial proceedings*]

RETAINED.

SECTION 115 [*Escape*]

RETAINED.

SECTION 116 [*Permitting prisoners to escape*]

RETAINED.

SECTION 118 [*Removal etc. of property under seizure*]

RETAINED.

SECTION 123 [*Disobedience of statutory duty*]

RETAINED.

SECTION 128 [*Disturbing religious assemblies*]

RETAINED.

SECTION 129 [*Trespassing on burial grounds*]

RETAINED.

SECTION 130 [*Writing or uttering words with intent to wound religious feelings*]

RETAINED.

SECTION 131 [*Hindering burial of a dead body*]

RETAINED.

SECTION 136 [*Abduction of girls under sixteen*]

The Commission considered whether this offence which often lead to the more serious offence of rape, should remain triable in Local Courts. The Commission observed that this offence is quite prevalent in certain areas as part of their cultural practice and allowing Local Courts to try such offences may ensure speedy trials as well as inculcate awareness in such societies that the practice was criminal and not condoned by law. The Commission however was aware that such offences often lead to more serious offences such as rape and needed to be treated seriously to protect the girl child. The Commission also recalled its recommendation to enhance the age for sexual consent from 13 years to 16 years penalty for this offence in its Report on the Review of the Penal Code⁵² and recommends that Local Courts should not have jurisdiction to try offences under this section to reflect the seriousness of the offence.

SECTION 137 (3) [*Insulting the modesty of a woman*]

RETAINED.

SECTION 141 [*Procuring the defilement of a woman by threat or fraud or administering drugs*]

⁵² See page 50 of the Report

The Commission noted that upon the review of the Penal Code, it was recommended that the offence be upgraded to a felony. The Commission therefore recommends that Local Courts should not have jurisdiction to try offences under this section.

SECTION 143 [*Detention with intent or in brothel*]

The Commission recommends that Local Courts should not have jurisdiction to try offence under this section for reasons cited under section 141 above.

SECTION 145 [*Male person living on earnings of prostitution or persistently soliciting*]

The Commission recommends that Local Courts should not have jurisdiction to try offences under this section for reasons cited under section 141 above.

SECTION 146 [*Woman aiding etc. for gain prostitution of another woman*]

The Commission recommends that Local Courts should not have jurisdiction to try offences under this section for reasons cited under section 141 above.

SECTION 164 [*Desertion of children*]

The Commission noted that the Report on the review of the Penal Code recommends that the offence under this section be upgraded to felony and should attract a maximum sentence of seven years. The Commission agrees with this recommendation and consequently recommends that Local Courts should not have jurisdiction to try offences under the section.

SECTION 165 [*Neglecting to provide food etc. for children*]

The Commission recommends that Local Courts should not have jurisdiction to try offences under this section for the same reasons as under section 164 above.

SECTION 166 [*Masters not providing for servants or apprentices*]

RETAINED.

SECTION 168 [*Common nuisance*]

RETAINED.

SECTION 169 [*Gaming Houses*]

The Commission observed that this offence is now covered under the Gaming Act and attracts serious penalties. The Commission thus considered that Local Courts should not have jurisdiction in these matters and recommends deletion.

SECTION 170 [*Betting houses*]

RETAINED.

SECTION 180 [*Idle and disorderly persons*]

Retained.

SECTION 181 [*Conduct likely to cause breach of the peace*]

RETAINED.

SECTION 182 [*Use of insulting language*]

RETAINED.

SECTION 183 [*Nuisances by drunken persons*]

RETAINED.

SECTION 184 [*Rogues and vagabonds*]

RETAINED.

SECTION 192 [*Negligent act likely to spread disease dangerous to life*]

The Commission recommends that Local Courts should not have jurisdiction to try offences under this section as the Commission has recommended the upgrading of this offence to a felony in its Report on the Review of the Penal Code⁵³.

SECTION 193 [*Adulteration of food or drink intended for sale*]

The Commission observed that the Report on the review of the Penal Code has recommended that the offence be upgraded to felony. The Commission therefore recommends that Local Courts should not have jurisdiction to try offences under this section.

SECTION 194 [*Sale of noxious food or drink*]

The Commission recommends that Local Courts should not have jurisdiction to try offences under this section for the same reason as recorded in discussing section 193 above.

SECTION 196 [*Sale of adulterated drugs*]

The Commission recommends that Local Courts should not have jurisdiction to try offences under this section for the same reason as recorded in discussing section 193 above.

SECTION 197 [*Fouling water*]

The Commission recommends that Local Courts should have jurisdiction to try offences under this section.

SECTION 198 [*Fouling air*]

RETAINED.

SECTION 241 (1) (only) [*Wounding and similar acts*]

The Commission recommends that Local Courts should not have jurisdiction to try offences under this section as they are serious offences.

SECTION 246 [*Reckless and negligent acts*]

⁵³ See page 50 of the Report.

The Commission recommends that Local Courts should not have jurisdiction to try offences under this section in view of its recommendation to upgrade this offence to a felony in its Report on the Review of the Penal Code⁵⁴.

SECTION 251 [*Conveying person by water for hire in unsafe or overloaded vessel*]

The Commission noted that the Report on the review of the Penal Code review has recommended that the offence be upgraded to felony. The Commission agreed with this recommendation as such offences could easily lead to deaths of passengers in such vessels and were indeed serious offences. The Commission therefore recommends that Local Courts should not have jurisdiction to try offences under this section.

SECTION 252 [*Danger or obstruction in public way or line of navigation*]

RETAINED.

SECTION 253 [*Common assault*]

RETAINED.

SECTION 254 [*Assault occasioning actual bodily harm*]

The Commission noted that the offence carried a maximum 5 year imprisonment term and was therefore a serious offence. The Commission recommends that Local Courts should not have jurisdiction to try offences under this section.

SECTION 278 (as read with Section 270 to Section 277) [*General punishment for theft*]

The Commission recommends that Local Courts should have jurisdiction to try offences under section 270 to section 277 (inclusive) and to mete out punishment as stipulated in section 278. The Commission however further recommends that the value of the thing stolen be enhanced to not exceed K10,000.00 from K200.00.

SECTION 299 [*Unlawful use of vehicles, animals etc.*]

The Commission recommends that Local Courts should have jurisdiction to try offences under this section. The Commission further recommends that the amount of fine be enhanced to K10,000.00 from £50.00.

SECTION 303 [*Assault with intent to steal*]

The Commission considered this a serious offence and initially the view was recommended that Local Courts should not have jurisdiction to try offences under this section. However the Commission revisited the matter and noted that these offences are fairly common in most rural areas. The Commission further noted that although they are felonies they occur frequently. The Commission therefore recommends that Local Courts should have jurisdiction to try these offences.

SECTION 314 [*Criminal trespass*]

⁵⁴ See page 57 of the Report.

RETAINED.

SECTION 316 [*Unauthorised user of land and premise*]

The Commission considered that people in rural Malawi do use land without authority such as cultivating protected areas and vending from unauthorized premises and places. The Commission was of the view that trial of such offences in Local Courts would instil awareness in local populations about the illegality of such practices as well as ensure speedy process. The Commission therefore recommends that Local Courts should have jurisdiction to try offences under this section.

SECTION 321 [*Cheating*]

The Commission observed that this is a very common offence and recommends that Local Courts should have jurisdiction to try such offences. The Commission however further recommends that the value of the thing obtained through such cheating should not exceed K10000.00 (up from K200).

SECTION 325 [*Pretending to tell fortunes*]

RETAINED.

SECTION 326 [*Obtaining registration etc by false pretences*]

RETAINED.

SECTION 327 [*False declaration for passport*]

RETAINED.

SECTION 328 (2) (only) as read with subsection (3). [*Receiving property unlawfully obtained*]

The Commission observed that such offences are common as people may steal items in urban areas and hide them with their relatives in remote areas. The Commission recommends that Local Courts should have jurisdiction to try offences under the section as above particularized. The Commission further recommends that the value of the stolen thing received should now not exceed K10,000 (up from K200).

SECTION 329 [*Person having in possession property suspected of being stolen*]

RETAINED.

SECTION 337 [*Arson*] (subsections (a) (b) and (c) only)

The Commission recommends that Local Courts should have jurisdiction to try offences under the section as particularized. The Commission however further recommends that the value of the subject matter of the arson should not exceed K10,000.00 up from K200.00.

SECTION 338 [*Attempts to commit arson*]

The Commission observed that certain aspects of arson as stated under section 337 above were triable by Grade A and Grade B Traditional Courts and thus would be triable by Local Courts whilst attempts to commit arson were not. The Commission considered whether it would not be appropriate that attempts to commit arson in the classes that are to be triable by Local Courts should also be triable by the Local Courts. The Commission however noted that such attempts were triable under the general provision for attempts under section 401 of the Penal Code. The Commission therefore recommends that section 338 need not be specifically included in the Schedule.

SECTION 339 [*Setting fire to crops*]

The Commission noted that this offence attracts a punishment of imprisonment of up to 14 years without the option of a fine. The Commission observed that this was offence initially not triable under Grade A and Grade B Courts. The Commission however considered whether it would not be appropriate that Local Courts should have jurisdiction to try such offences. This was in view of the fact that most communities in rural Malawi are agricultural and such offences would be fairly common. The Commission was aware that such communities held the offence of burning crops very seriously as it impacted heavily on the livelihood of the people. On the other hand, the Commission was equally aware that there might be situations where the value of the crop burnt may not warrant such a stiff penalty as stipulated by this section.

In the final analysis, the Commission recommends that Local Courts should have jurisdiction to try offences under this section but that it should only be in cases where the value of the crop burnt does not exceed K10,000.00. The Commission was of the view that this approach would ensure that access to justice is assured for less serious cases of crop burning whilst the seriousness of the offence was still preserved.

SECTION 344 (SUBSECTION (1) only) [*Malicious damage*]

The Commission recommends that Local Courts should have jurisdiction to try offences under subsection (1) of section 344. The Commission further recommends that the value of the subject matter should not exceed K10,000.00.

SECTION 389 [*Personation in general*]

The Commission recommends that Local Courts should have jurisdiction to try offences under this section.

SECTION 401 [*Attempts, provided that a person may only be tried for an attempt to commit an offence which the court has power to hear*]

The Commission recommends that Local Courts should have jurisdiction to try offences under this section.

2. CONVICTED PERSONS (EMPLOYMENT ON PUBLIC WORK) ACT (CAP. 9:03)

The Act makes provision for ordering convicted persons to perform public work in lieu of serving a term of imprisonment. This is done through the establishment of labour camps under the Act. The Commission observed that in the current dispensation, such camps would be considered unconstitutional. The Commission was aware that the present regime of community service would achieve the same purpose if managed properly. The Commission thus recommends that Local Courts should have jurisdiction over Community Service Regulations as promulgated under the Criminal Procedure and Evidence Code. Consequently, reference to the Convicted Persons (Employment On Public Work) Act should be deleted from the Order.

3. POLICE ACT (CAP. 13:01)

The Grade A and Grade B Traditional Courts could only try three offences under this Act. These are—

- (a) Section 26 - Penalty for disobeying order or violating conditions of a permit issued under section 25
- (b) Section 27 - Unlawful assemblies
- (c) Section 28 - Penalty for any violation of an order prohibiting meetings and processions.

The Commission recommends that these offences should be triable by Local Courts. The Commission was also aware that the special Commission on the Review of the Police Act has recommended amendments to these provisions to be replaced by a new part on Regulation of Assemblies.

In the event that those proposals are indorsed by Parliament, these provisions should accordingly be amended for consistency.

4. PRESERVATION OF PUBLIC SECURITY ACT (CAP. 14:02)

The Commission recommends that Local Courts should not try any offences created under this Act. The Commission was of the view that this is an Act that had been abused in the past by the State using Traditional Courts and it could easily be abused again.

5. FIREARMS ACT (CAP 14:08)

The Commission observed that this area is very formalized and deals with matters of public security and it would therefore not be ideal that Local Courts should have jurisdiction over offences under the Act. The Commission therefore recommends deletion of this Act from the Order

6. LOCAL GOVERNMENT (URBAN AREAS) ACT (CAP. 22:01) AND
LOCAL GOVERNMENT (DISTRICT COUNCILS) ACT (CAP. 22:02)

The Commission noted that the two Acts were repealed and replaced by one Act, the Local Government Act. The Commission recommends that Local Courts

should have jurisdiction over all by-laws made under the Act and applying within the jurisdiction of each court.

7. PUBLIC HEALTH ACT (CAP. 34:01)

The Commission recommends that Local Courts should try offences under this Act under Parts III, IV and V only.

8. TAXATION ACT (CAP. 41:01)

The Commission recommends that Local Courts should not have jurisdiction over this Act.

9. CUSTOMS AND EXCISE ACT (CAP. 42:01)

The Commission recommends that Local Courts should not have jurisdiction over this Act.

10. BUSINESS LICENSING ACT (CAP. 46:01)

The Commission recommends that Local Courts should have jurisdiction over offences under this Act.

11. HIDE AND SKIN TRADE ACT (CAP. 50:02)

The Commission recommends that Local Courts should have jurisdiction over offences under this Act.

12. INTOXICATING LIQUOR ORDINANCE

The Commission noted that the Intoxicating Liquor Ordinance has been replaced by the Liquor Act. The Commission recommends that Local Courts should have jurisdiction over offences under the Liquor Act.

13. REGULATION OF MINIMUM WAGES AND CONDITIONS OF EMPLOYMENT

The Commission noted that the Regulation of Minimum Wages and Conditions of Employment has been repealed and replaced by the Employment Act.⁵⁵ The Commission therefore considered the provisions of the Employment Act to determine whether Local Courts could have jurisdiction over the whole Act or any specific parts or sections. The Commission identified the following sections as creating offences and made the relevant observations and recommendations as thereunder respectively recorded.

SECTION 4 [*Prohibition against forced labour*]

The section prohibits forced labour and prescribes a fine of K10,000 and to imprisonment for two years to be imposed on any offender. The Commission observed that although the maximum term of imprisonment is two years, such offences would be common place in most places and Local Courts would be best placed to handle such matters. However the prosecuting authority would have discretion in choosing the best forum where to try such offences. The Commission accordingly recommends that Local Courts should have jurisdiction to try offences under this section.

⁵⁵ Cap 56:01

SECTION 21 [*Prohibition against child labour*]

The section prescribes against employment of persons under the age of fourteen in “any public or private agricultural, industrial or non-industrial undertaking or any branch thereof”. The penalty for the offence is a fine of K20,000.00 and imprisonment for five years as stipulated in section 24. Again the Commission observed that such offences would be prevalent in most rural areas and that Local Courts by their envisaged convenient geographical positioning would be best placed to handle such cases. The Commission therefore recommends that in spite of the apparent stiff penalties, Local Courts should have jurisdiction to try offences under this section and may commit cases for sentencing to the nearest magistrate court.

SECTION 22 [*Hazardous work*]

The section prescribes against employment of persons between the age of fourteen and eighteen in occupations or activities that are generally harmful to health and development and prejudicial to their attendance at school. The Commission considered that inspite of the stiff penalties under section 24, such offences could be common place in most parts of Malawi and Local Courts would play a pivotal role in eliminating such practices if they were to have jurisdiction over offences under the section. The Commission accordingly recommends that Local Courts should have jurisdiction to try offences under this section.

SECTION 52 [*Prohibition relating to payment of remuneration*]

The section provides for how an employer may not deal with an employee’s remuneration to the detriment of such employee. It also prescribes the only deductions which an employer may lawfully make out of an employee’s remuneration. Any other deductions would therefore be illegal. Thus any contraventions of this section would be an offence and the offender would be subject to section 66 which provides for a penalty of a fine of K5000 and to imprisonment for one year. The Commission considered the penalties to be in line with the general sentencing powers granted to Local Courts. The Commission accordingly recommends that offences created under section 52 as read with section 66 should be triable by Local Courts.

SECTION 66 [*Offences and penalties*]

The section creates general offences and general penalties where no specific offence or specific penalty has been created. The fine is pegged at K5000.00 and the term of imprisonment is one year. The Commission recommends that Local Courts should have jurisdiction to try offences under this section.

14. SHOP HOURS ACT

The Commission noted that the Act was repealed and would therefore not be necessary to be considered.

15. AFRICAN EMIGRATION AND IMMIGRANT WORKERS ACT

The Commission observed that the Act is obsolete and hence should be deleted from the Order.

16. FOREST ACT (CAP. 63:01)

The Commission noted that this Act was repealed and replaced with the Forestry Act. The Commission therefore proceeded to look at Part X of the new Act in which several offences are created and made the following observations and recommendations.

SECTION 64 [*Offences relating to forest reserves and protected areas*]

The penalty under this section is a fine of K5000 and imprisonment for five years. The Commission however noted that in the main Act the prohibited acts under the section, such as felling indigenous trees, would be quite common in communities bordering forest reserves and protected areas. This persuaded the Commission to hold the view that Local Courts would be able to handle such cases and this might enhance protection of the forest reserves and protected areas. The Commission accordingly recommends that Local Courts should have jurisdiction to try offences under this section.

SECTION 65 [*Offences relating to fires*]

The section is in three subsections. Subsection (1) punishes persons who light or cause fire to be lit in a forest and imposes a fine of K10,000.00 and imprisonment for 5 years. Subsection (2) punishes persons who allow a fire to burn out of control in or spread to a forest. The penalty is again a fine of K10,000.00 and imprisonment for five years. Subsection (3) punishes people who for no reasonable cause, refuse to assist in averting or extinguishing a fire when required to do so under section 41. The penalty is a fine of K2000.00 and imprisonment for 1 year.

The Commission considered that despite the stiff penalties for offences under subsections (1) and (2), the Local Courts would still be better placed to deal with such offences which would obviously be localized to areas where such forest reserves are situate. The Commission was of the view that the prosecuting agency would still have discretion to take serious offences under the section to magistrates courts where necessary. The Commission therefore recommends that Local Courts should have jurisdiction to try offences under this section.

SECTION 66 [*Offences relating to wildlife*]

The section seeks to protect animals, birds, fish or reptiles and their eggs or spawn where applicable.

The section punishes any person who contravenes it with a fine of K10,000.00 and to imprisonment for five years. As under section 65 above, the Commission recommends that Local Courts should have jurisdiction to try offences under this section for similar reasons as those advanced under the preceding section.

SECTION 68 [*Offences relating to possession or trafficking of forest produce*]

The offence attracts a penalty of a fine of K20,000.00 and imprisonment for 10 years. Initially, the Commission considered that in view of the severe punishment imposed, Local Courts should not have jurisdiction to try offences under this section. Upon further reflection, the Commission changed its position and felt that just like under section 65 above offences under this section should be triable by Local Courts and that the prosecutor may, where necessary take more serious cases to magistrates courts.

SECTION 69 [*Offences relating to obstruction of officers*]

The Commission recommends that Local Courts should have jurisdiction to try offences under this section although the penalty is a fine of K10,000.00 and imprisonment for five years. The reasoning is the same as for sections 65, 66 and 68 above.

SECTION 70 [*Offences relating to official documents or stamps*]

The section creates offences pertaining to the forgery of official documents relative to the Forestry Act. The punishment is a fine of K20,000.00 and imprisonment for ten years. The Commission noted that forgery is a serious offence and recommends that Local Courts should not have jurisdiction over offences under this section.

SECTION 71 [*Offences relating to possession or use of weapons, traps, explosives, and poisons for hunting animals*]

The Commission considered the reference to weapons and the stiff penalty of a fine of K20,000.00 and imprisonment for 10 years as proof of the seriousness of the offences created under section 43 as read with section 71. However the Commission recommends that Local Courts should have jurisdiction over offences under section 71 for the same reasons as under sections 65, 66, 68 and 69 above.

SECTION 73 [*Offences relating to import, export and re-export of forest produce*]

The Commission recommends that Local Courts should not have jurisdiction to try offences under this section. This is because the section provides for a minimum sentence of 5 years and leading evidence in such cases before these courts would likely to be problematic.

SECTION 74 [*Additional orders upon conviction*]

The Commission considered that the section was an appropriate one to be applied by Local Courts in respect of those offences which have been recommended as properly triable by these courts. The Commission accordingly recommends that Local Courts should have jurisdiction over this section.

17. PLANT PROTECTION ACT (CAP 64:01)

This Act provides for the eradication of pests and diseases destructive to plants, prevention of the introduction and spread of pests and diseases destructive to plants and matters connected therewith and incidental thereto. Section 11 creates offences and penalties under the Act. There are two categories of penalties:

(i) for an offence under paragraph (d), which offence, relates to malicious introduction of a pest on to land or premises in Malawi, to a fine of four hundred pounds and to imprisonment for four years;

(ii) for any other offence, to a fine of one hundred pounds and to imprisonment for six months.

In view of the nature of the offence under section 11(1) (d), the Commission considered that Local Courts should not try such offences as requisite competences may not obtain in such courts. The Commission accordingly recommends that Local Courts should not have jurisdiction over offences under this Act except offences under that section.

18. NOXIOUS WEEDS ACT (CAP. 64:02)

This Act makes provision for the eradication of noxious weeds. There are several offences created under the Act but the penalties are stipulated in sections 3 and 7 respectively. The penalty under section 3 is a fine of £10 or in default of payment to imprisonment for one month whilst the penalty under section 7 is a fine of £25 or in default of payment to imprisonment for 3 months. The Commission found the penalties to be in consonant with the general scheme of sentencing powers of Local Courts. The Commission therefore recommends that Local Courts should have jurisdiction to try offences under this Act.

19. TOBACCO ACT (CAP. 65:02)

The Commission observed that the penalties for offences under the Act were light. Section 35 stipulates a fine of up to MK1,000.00 and imprisonment for 1 year. In addition, tobacco in respect of which an offence was committed may be forfeited. The Commission recommends that Local Courts should have jurisdiction to try offences under this Act.

20. PROTECTION OF ANIMALS ACT (CAP. 66:01)

The Act makes provision for the protection of domestic or captive animals. Offences are created in section 3 of the Act and the penalties are stipulated in the same section. The penalties are a fine of up to £25 and imprisonment for 6 months.

The Commission recommends that Local Courts should have jurisdiction to try offences under this Act.

21. CONTROL AND DISEASES OF ANIMALS ACT (CAP. 66:02)

This Act makes provision for the control and diseases of animals. The general penalties are stipulated in section 22 and are a fine of up to K200 and imprisonment of up to 6 months. In addition there may be ordered forfeiture of the subject matter of the offence.

The Commission noted that the levels of punishment were in line with the general sentencing powers of Local Courts. The Commission therefore recommends that Local Courts should have jurisdiction to try offences under this Act.

22. GAME ACT

The Commission noted that the Act was repealed and recommends its deletion from the Order.

23. WILDBIRDS PROTECTION ACT

The Commission noted that the Act was repealed and recommends its deletion from the Order.

24. FISHERIES ACT (CAP. 66:05)

The Commission observed that this Act was repealed and replaced by the Fisheries Conservation and Management Act. The Commission recommends that Local Courts should have jurisdiction to try offences under this new Act.

25. CROCODILES ACT (CAP. 66:06) AND NATIONAL PARKS ACT (CAP. 66:07)

The Commission noted that these Acts have been repealed and replaced with the National Parks and Wildlife Act. The Commission noted that the range of fines under the Act is from K200.00 to K10,000.00 whilst that of terms of imprisonment is from three months to five years. In addition, the new Act provides for the forfeiture of things or animals used in the commission of an offence under the Act.

The Commission was of the view that even though the top range of penalties is a fine of K10,000.00 and imprisonment for five years, the general nature of offences created under the Act was such that they should be triable by Local Courts as they were likely to be localized. The Commission therefore recommends that Local Courts should have jurisdiction to try offences under the Act.

26. ROAD TRAFFIC ACT (CAP. 69:01)

The Commission recommends that Local Courts should only have jurisdiction to try offences created under the Regulations.

TRADITIONAL COURTS (APPEALS) ORDER

The Commission noted that the provisions of section 34 cover all what is spelt out in the Order. The Commission recommends repeal of the Order for irrelevancy.

TRADITIONAL COURTS (BAIL) RULES

Under section 40

The Commission recommends that these rules should be revoked and that Local Courts should use the Bail (Guidelines) Act which is very comprehensive and is designed to apply in all courts subordinate to the High Court.

TRADITIONAL COURTS (APPEALS) RULES

under s. 40

These rules make provision for the procedure to be followed for lodging an appeal from a lower Traditional Court to a higher one. The Rules reflect the parallel system of courts that prevailed in Malawi previously. The Commission made the following observations in respect of the rules.

RULE 1 [*Citation and application*]

The Commission recommends that this rule should be amended to read as follows—

Citation and
application

(1) These Rules may be cited as the Local Courts (Appeals) Rules and shall apply to all cases determined in a court of first instance.

RULE 2 [*Interpretation*]

“appeal court”

The Commission recommends that this definition should be amended to read as follows—

“appeal court” means a District Appeals Local Court having jurisdiction to hear appeals from all local courts in the district;

“court of first instance”

The Commission recommends that the expression “court of first instance” should be defined to read as follows—

“court of first instance” means a Local Court established under section ... of the Act.

RULE 3 [*Where no procedure laid down*]

The provision empowers a Traditional Court of Appeal to improvise procedure where no procedure is laid down. The Commission considered that the discretion given to the courts in this regard may breed inconsistency in court procedures when dealing with appeals. Further, the Commission considered that the discretion may assign different standards especially in criminal matters and this is not acceptable under the present constitutional set up. The Commission took the view that where no procedure is laid down the courts should be required to apply appropriate provisions obtaining in magistrate courts. The Commission thus recommends amendment of the rule as follows—

Where no
procedure laid
down

3. In any matter of practice or procedure not specifically procedure provided for in these Rules, a District Appeals Local Court laid down may apply any appropriate provision applicable in a magistrate court.

RULE 4 [*Notice of appeal*]

Subrule (3) requires that a notice of appeal should be in writing except where the accused is an illiterate person. In such cases, oral notice to the clerk of such court suffices. The clerk is required to record the notice in writing. The Commission observed that there are other grounds which would justify giving notice verbally besides illiteracy. An example given was where the concerned person is sick.

Further, the Commission observed that the rule does not prescribe time limit for lodging an appeal as contained in section 34. The Commission recommends amendment to incorporate the notice period of thirty days as required under section 34 accordingly.

RULE 5 [*Extension of time*]

The rule allows for the extension of time for lodging an appeal following an application. The Commission recommends retention.

RULE 6 [*Appeal not to operate as stay*]

The rule provides that a notice of appeal shall not operate as a stay of any sentence. The Court may however release a convicted person on bail pending the hearing of appeal. The Commission recognized that the rule is dealing with a matter which is substantive and thus inappropriately relegated to subsidiary legislation.

The Commission thus recommends that the provision should be uplifted to the main Act and should be aligned with section 355 of the Criminal Procedure and Evidence Code to read as follows—

Stay of
execution and
admission to
bail pending
appeal

(1) Notice of intention to appeal shall not operate as a stay of execution of any sentence or order, but the court of first instance which passed the sentence of imprisonment or made the order, may order that any such sentence or order be stayed pending the hearing of an appeal and if the appellant is in custody that he may be released on bail with or without sureties, pending such hearing.

(2) If the appeal is ultimately dismissed and the original sentence confirmed or some other sentence of imprisonment substituted therefor the time during which the appellant was released on bail shall not be included in calculating the period of imprisonment still to be served.

RULE 7 [*Record of proceedings in criminal appeals*]

The provision mandates the court clerk on receipt of a notice of appeal to prepare a record of the proceedings of the lower court consisting of a copy of the summons, complaint or charge and plea; the notes of evidence taken in the case and all documentary evidence; the order or decision appealed from; the grounds of decision; and the notice and grounds of appeal.

The Commission observed that in sub rule (2), the word “notify” appearing in the second line has been used inappropriately and recommends deletion and substitution with the word “**forward**”.

The Commission in discussing the features of the court record observed that paragraph (a) refers to a “complaint” as part of the record. The Commission considered the system of commencing prosecutions in such manner as not acceptable under the Constitution as such prosecutions would be commenced without the sanction of the Director of Public Prosecutions. The Commission was aware that this system developed because Traditional Courts were part of the Executive. The Commission thus recommends deletion of the word “complaint” to ensure that prosecutions are conducted within the framework of the Constitution.

In paragraph (c), the Commission recommends deletion of the words “decision appealed from” and substitution therefore with the word “**judgement**”. Further in paragraph (d), the phrase “the grounds of decision” should be substituted with the word “sentence”.

RULE 7A [*Appellant in prison*]

The provision requires of the appellant who is in prison to present the notice of appeal to the Officer-in-Charge of the prison in which he is being held. Upon receipt by the Officer-in-Charge, he shall forward the petition to the Registrar of the Traditional Court of Appeal.

In subrule (1), the Commission recommends that the word “petition” should be deleted and substituted with “**notice**”. Further, “Registrar of the Traditional Appeal Court” should be replaced with the phrase “**District Appeals Local Courts**” having jurisdiction.

RULE 8 [*Record of proceedings in civil appeals*]

The rule provides for the procedure to be followed on receipt of notice by the clerk of the court.

In discussing the record of proceedings as provided by subrule (3), the Commission recommends the following amendments:

In paragraph (b), by inserting the words “**taken in the case**” immediately after the word “evidence” for clarity. In paragraph (d) by replacing the words “decision appealed from” with the word “**judgement**” for consistency with rule 7 (2) (d).

Subrule (4) passes on to the appellant the cost of preparing the record. The same practice subsists in the High Court system. The Commission however considered the practicality of retaining this practice in Traditional Courts bearing in mind that the clientele of these courts are ordinary Malawians who, in most cases, cannot afford court costs. To that end, the Commission recommends that the appellant should not be required to pay the cost of preparing the court record. Subrule (2) should thus be amended to read as follows—

(2) On receipt of the notice of appeal, the clerk of the court of first instance shall forthwith notify the appeal to the appeal court having jurisdiction in the matter and shall prepare and forward copies of the court record for each of the parties concerned in the appeal and for District Appeals Local Court having jurisdiction.

RULE 9 [*Grounds of decision*]

The provision provides for situations where a court of first instance did not record the grounds of decision at the time of making the order or decision and requires such court to do so within two weeks of the period of notice of appeal. The Commission recognized that this provision legalizes oral judgements and considered such practice undesirable. The Commission thus recommends deletion of the rule.

RULES 11A AND 11B

These rules provide for dispensing with the appearance of the respondent, failure of the respondent to appear in cases where no application has been made to dispense with his appearance and procedure for setting aside judgment in situations where the appeal has been heard ex-parte. The Commission recommends that these rules should be redrafted along the lines of rules 14, 15 and 16 of the Traditional Courts (Appeals to High Court) Rules promulgated under the Courts Act.

RULE 11C [*Application to set aside ex-parte judgement*]

The rule provides that an ex-parte judgement may be set aside where the respondent applies within 21 days for such judgement to be set aside.

In the proviso, the Commission observed that certain words were omitted inadvertently and recommends insertion of the word “**Where**” at the beginning of the second sentence and insertion of the word “**it**” immediately before the word “may” appearing in the seventh line.

RULE 12 [*Evidence*]

The rule empowers an appeal court in any civil matter to direct that the appeal shall be conducted by way of re-hearing where it considers it necessary so to do in the interests of justice. In the case of a criminal appeal, an appeal court may admit fresh evidence so long as such evidence is not given for the prosecution.

The Commission observed that the outright prohibition of the prosecution to adduce fresh evidence on appeal may in some cases lead to miscarriage of justice.

The Commission was aware that under sections 257 and 316 of the Criminal Procedure and Evidence Code the court may allow the prosecution, where the defence introduces new matter in evidence which the prosecution could not by the exercise of due diligence have foreseen, to adduce evidence in reply to rebut the said matter.

The Commission thus recommends deletion of the proviso to subrule (2) and replacement with the following new proviso—

Provided that where the fresh evidence admitted by the court introduces a new matter which the prosecution could not by the exercise of reasonable diligence have foreseen, the court may allow the prosecution to adduce evidence in reply to rebut the said matter.

RULE 14 [*Decision by appeal court*]

In subsection (2), the Commission recommends deletion of the words “upon the appellant” appearing in the first line for redundancy.

FIRST SCHEDULE

The Schedule provides the format for a warrant of committal or release. The Commission observed that the heading of the Schedule deals with two unrelated issues and recommends that the Schedule should be split into two, to create two forms, one for a Warrant of Committal and the other for a Release Order. This would ensure neatness and prevent mistakes and abuses.

The amended Schedule will read as follows—

FIRST SCHEDULE
GOVERNMENT OF MALAWI
WARRANT OF COMMITTAL

In the District Appeals Local Court.

Appeal Case No. 20..... Local Court Case No. 20
..... Local Court
(1) Appellant

versus

THE REPUBLIC

To the Officer-in-Charge of the Prison at (2)

As a result of the hearing of the appeal in the above case

..... District Appeals Local Court now orders that –

THE SENTENCE IMPOSED BY THE LOCAL COURT
ON DATE BE SET ASIDE AND the following new sentence be
imposed

The appellant shall serve a sentence of Imprisonment which shall
take effect from theday of 20

Dated this day of 20

APPEAL COURT SEAL

.....
Chairperson
District Appeal Local Court

NOTE - See below for instructions on how to complete the form

- (1) Insert name of appellant
- (2) Insert name of place

GOVERNMENT OF MALAWI

RELEASE ORDER

In the District Appeal Local Court

Appeal Case No. 20 Local Court Case No 20

..... Local Court

(1) (Appellant)

versus

THE REPUBLIC

To the Officer-in-Charge of the Prison at (2)

As a result of the hearing of the appeal in the above case

District Appeal Local Court now orders that

THE SENTENCE IMPOSED BY THE LOCAL COURTS

ON DATE BE SET ASIDE AND

The appellant be immediately released.

(a) The appellant shall pay a fine of MK to be paid by the ...day of
....., 20 or in default to serve a period of
community service

(b) The appellant who was sentenced to imprisonment but is
now ordered to serve a period of community service, shall be
released from prison to perform community service

Dated this day of 20

.....
Chairperson
District Appeal Local Court
.....

NOTE: See below for instructions on how to complete the form

(1) Insert name of appellant

(2) Insert name of place

TRADITIONAL COURTS (PROCEDURE) RULES

PART I—INTERPRETATION

RULE 1 [*Citation*]

In view of the recommendation to change the name of the courts, the rule shall read as follows—

Citation **1. These Rules may be cited as Local Courts (Procedure) Rules.**

RULE 2 [*Interpretation*]

The Commission recommends the following amendments to this rule—

“Chairman”

To promote the use of gender neutral language the Commission recommends that the word “**Chairman**” should be deleted and substituted with “**Chairperson**”.

“Court messenger”

The Commission recommends deletion of this definition for irrelevancy.

“language of the court”

The Commission recommends amendment of the definition to read as follows—

“language of the court” means the vernacular language of the area in which the court is situated;”

“tax case”

The Commission recommends deletion of this expression from the rule and wherever it appears for irrelevancy.

“witness”

The Commission recommends that this definition should be shifted to the main Act and further that the word “**defendant**” used in the definition should be substituted with the word “**accused**” in line with the Constitution’s language.

PART II—COMMENCEMENT OF PROCEEDINGS

RULE 3 [*Registers*]

The rule provides for the registers that are to be kept by a clerk at every court. These include a criminal register, civil register and a register in respect of tax cases. The Commission recommends deletion of the reference to “tax cases” since the type of tax cases envisaged to be handled by such courts no longer exists.

The Commission further considered that it would be important to separate juvenile cases from adult cases and recommends that a clerk should also keep a separate register in respect of juvenile cases. The Commission was aware that there

is already an initiative to create separate courts for juveniles by the Judiciary and considered its proposal as a stop gap measure till such courts are established⁵⁶.

RULE 4 [*Identification number of cases*]

The rule requires that every case be assigned a serial number in accordance with the year that the case started for purposes of identification.

The Commission recommends deletion of the reference to “**tax register**” and substitution therefor with “**juvenile case register**” in view of the recommendation to introduce a separate register for young offenders.

Further, the year “1969” should be deleted wherever it appears in the rule and substituted therefor with “**20...**”.

RULE 5 [*Jurisdiction*]

The Commission observed that the rule refers to a case at a stage when it is a mere complaint before a clerk. The Commission considered this position erroneous and recommends that the word “case” appearing in the first line should be deleted and substituted therefore with “**complaint**”. Further, the words “**emanating from such complaint**” should be inserted at the very end of the rule to complete the substance of the provision.

RULE 6 [*Complaint Book*]

The rule provides for the procedure to be followed when filing a complaint with the court clerk and treats both civil and criminal complaints similarly in terms of commencement of proceedings.

The Commission considered the use of similar procedures in initiating both civil and criminal matters inappropriate and recommends separation of the two. The Commission further considered the process of presenting a complaint before the Chairperson as contradicting the Constitution especially the doctrine of separation of powers which has put this power squarely on the executive through the Office of Director of Public Prosecutions. The Commission thus recommends that prosecution should thus be instituted at the instance of that office only. The Commission thus recommends adoption of the following two new rules.

Commence-
ment of civil
matters

6.—(1) A person desiring to start a case shall explain the facts of the case to the clerk who shall record a summary of the complaint in a complaints book.

(2) Upon payment of the prescribed fee, the clerk shall enter the case in the civil register and shall give it a serial number and shall prepare a summons in Form 2 in the First Schedule.

⁵⁶ Further the special Commission on Child Rights Reforms has also recommended the introduction of separate courts for young persons in conflict with the law in its Report on the Review of the Children and Young Persons Act dated 23rd December, 2005.

Malawi Government Gazette Supplement, 18th December, 2003.

Commence-
ment of
criminal
matters

7.—(1) Proceedings in criminal matters may be instituted by a public prosecutor or police officer signing and presenting a formal charge to a Chairperson.

(2) Upon presentation of a formal charge to a Chairperson, a clerk shall enter the case in the criminal register or the juvenile register, whichever is applicable and shall give it a serial number, and unless the accused is in custody, shall prepare a summons in Form 1 in the First Schedule.

(3) Any charge prepared pursuant to this rule shall be in accordance with the provisions of section 128 of the Criminal Procedure and Evidence Code.

Cap. 8:01

RULE 7 [*Criminal cases*]

The provision describes a criminal case. The Commission considered that the description properly belongs to a handbook and recommends deletion of this rule.

RULE 8 [*Civil cases*]

The provision describes a civil case. Similarly the Commission was of the view that the description belongs to a handbook and recommends deletion of this rule.

RULE 9 [*Civil and criminal cases*]

The provision gives an illustration of a situation where the facts of a case discloses both a criminal and civil case. The Commission recommends deletion of this rule for irrelevancy.

RULE 10 [*Entry of criminal cases in register*]

The Commission recommends deletion of the provision in view of the proposed amendments to the new rule 7.

RULE 11 [*Entry of civil cases or tax case in register*]

The Commission recommends deletion in view of the proposed amendments to rule 6.

PART III—DATE OF HEARING AND PREPARATION AND SERVICES OF SUMMONS

RULE 12 [*Date of hearing*]

The rule requires a clerk to apply to the Chairperson to fix a date of hearing as soon as possible after a case has been entered in a register. In view of the recommendation to separate the criminal and civil aspect of the rules, the Commission recommends adoption of two separate rules. The Commission further considered that the fixing of the date of hearing should be automatic once a complaint or charge has been entered in a register and recommends that the two rules should be read as follows —

Date of hearing
in a criminal
matter

12.—(1) Once a case has been entered in a register, the Local Court shall fix the date of hearing.

(2) In fixing the date for hearing the court shall take account of the necessity for service of summons to be effected on the accused not less than seven clear days before the date of hearing, and the places of residence of any witnesses of whom the court is informed:

Provided that if the accused is present before the court and consents, the trial may proceed forthwith or on any convenient date.

Date of hearing
in a civil matter

13.—(1) Once a case has been entered in a register, the Local Court shall fix the date of hearing.

(2) In fixing the date for hearing the court shall take account of the necessity for service of summons to be effected on the defendant not less than seven clear days before the date of hearing, and the places of residence of any witnesses of whom the court is informed:

Provided that if the defendant is present before the court and consents, the trial may proceed forthwith or on any convenient date.

RULE 13 [*Particulars to be entered*]

The rule provides for the mode of preparing a summons and requires that a summons should either state briefly the offence against an accused or the substance of the complainants claim and the amount in dispute or value of the subject matter of the claim.

In subrule (1), the Commission recommends that the civil and criminal aspects should be separated and should come immediately after rules 6 and 7 respectively and should read as follows –

Particulars to
be entered

6A.—(1) A summons in a civil case shall be prepared in duplicate and shall be signed by the Chairperson.

(2) The summons shall state briefly the substance of the complainant's claim and the amount in dispute or the value of the subject matter of the claim and such amount or value shall in no case exceed the amount in which the court has jurisdiction.

Particulars to
be entered

7A.—(1) A summons in a criminal case shall be prepared in duplicate and shall be signed by the Chairperson and shall be served on the accused not less than seven clear days before the date of hearing.

(2) The summons shall state briefly the offence with which the defendant is charged, and shall specify the written law creating the offence concerned.

RULE 14 [*Summons to witness and notice of hearing*]

The rule empowers a complainant or accused person who wishes to compel the attendance of any witness to give evidence at the trial to apply to the court for a summons to be served on the witness.

The rule further places the responsibility of ensuring that such witness attend trial on government in both civil and criminal matters.

First, the Commission recommends splitting of the rule to provide for criminal and civil matters separately. The Commission further recommends insertion of the words **“to the court”** in subrule (1) in the third line immediately after the word **“apply”** for clarity.

The Commission also considered the appropriateness of the policy of requiring government to bear some cost of litigation in facilitating attendance of witnesses. The Commission was mindful of the persistent problem of under funding in the Judiciary and could not find any moral justification for requiring government to take responsibility for private matters. The Commission considered it only fair to require people involved in civil litigation to contribute and recommends an amendment to subrule (3) to that effect.

Further, in dealing with the same subrule, the Commission observed that the Chairman is given discretion to fix the time within which service of a summons outside the courts area of jurisdiction is to be effected. The Commission considered this discretion too wide and liable to abuse and recommends that the subrule should reflect that service shall be **“within a reasonable time”**.

RULE 15 [*Contents and Service of summons*]

The rule provides for the mode of serving a summons and require that every person named in a summons should appear before the court on the date of hearing.

The Commission recommends a number of amendments. Firstly, the marginal note refers to contents and service of summons. The Commission however observed that the rule does not provide for **“contents”** of a summons and recommends deletion of the reference to **“contents”** in the marginal note on that basis.

Secondly, in view of the recommendation to split rule 13 and reposition the subsequent two subrules, the cross reference to that rule should be deleted. The expression **“court messenger”** in subrule (1) should also be deleted and replaced with **“court marshal”** to accord with current practice.

Thirdly, the Commission observed that service of a summons can only be effected on the husband or wife of the person in the absence of the person named in the summons. The Commission considered that the focus on only spouses might hinder justice and recommends that the ambit of persons who can effectively acknowledge service in the absence of the named person should be widened to

include **“any adult person residing with or working as a servant of the named person”**.

Fourthly, the Commission recommends that acknowledgement of summons should be by signature or thumb print of the person served. Further, where a named person or any person that might accept service on behalf of the named person refuses service, the court marshal should make an endorsement to that effect.

Lastly, the Commission observed that the rule does not provide for service by post and recommends incorporation of this aspect. The Commission also recommends that service by post should be supported by affidavits.

The amended rule is to read as follows—

Service of
summons

15—(1) Every summons issued under rules 6 and 8 shall require the person named in it to appear before the Local Court on the date of hearing and shall if reasonably practicable be served on him personally by a court marshal or other officer of the Local Court, delivering one copy to him.

(2) If the person named in the summons cannot be found after a careful search, the summons may be served by delivering one copy to a spouse or any adult person residing with the named person or working as a servant of the named person.

(3) The person serving the summons shall write on the back of the other copy the place, date and time when he served the summons and the name of the person upon whom it was served and that person shall be required to acknowledge service by signature or thumb print:

(4) A court marshal or any officer of a Local Court serving a summons shall indorse at the back of a summons where a person refuses to acknowledge service.

(5) Where it is not practicable to effect service of summons in the manner provided in the preceeding subrules, service of summons shall be effected by post.

(6) Where service of summons is effected by post, it shall be supported by affidavits.

RULE 16 [*Failure of witness to obey summons*]

In subrule (1), the words “of the Act” appearing in the second line should be deleted for irrelevancy. In the third line the reference to “rule 14” should be deleted and replaced with **“rules 14 and 15”**. Furthermore the illustration that follows subrule (2) should be deleted for irrelevancy.

RULE 17 [*Failure of defendant to obey summons*]

The rule creates an offence for failure to obey a summons. The Commission recommends amendment so that the rule shall read as follows —

Failure of
accused to obey
summons

(1) If an accused, without lawful excuse—

- (a) fails to attend before the Local Court at the time and place stated in the summons;**
- (b) having attended, goes away without first being given permission by the Court;**
- (c) fails to attend after an adjournment of the Court after being told by the Court so to do,**

the Court may issue a warrant in Form ... in the ... Schedule for his arrest and for him to be brought before Court.

(2) The warrant under subrule (1) shall be issued only where the Court is satisfied that the accused has been served with the summons.

RULE 18 [*Application of section 93 of the Criminal Procedure and Evidence Code (CAP. 8:01)*]

The rule empowers a court Chairperson to dispense with attendance of an accused person in cases where the offence is punishable with a fine only or with both fine and imprisonment for a term not exceeding three months or with a fine or imprisonment of not more than three months. This power is conferred using the power under section 93 of the Criminal Procedure and Evidence Code with the necessary adaptations.

In subrule (2), the Commission recommends deletion of paragraphs (a) and (c) in view of the recommendations made earlier to remove the power to issue summons from clerks and to replace defendant with “**accused person**” respectively.

RULE 19 [*Power of court to order prisoner to be brought to give evidence*]

The rule empowers a Traditional Court to order any person confined in any prison to be brought to court and be examined as a witness in a hearing either on application of any party to the case or on its own motion. The order shall be to the Officer in-charge of the concerned prison and shall be in Form 6 in the First Schedule.

The Commission recommends retention.

PART IV

EVIDENCE AND FUNCTIONS OF ASSESSORS

RULE 20 [*Swearing of witnesses*]

The rule makes provision for the procedure to be followed before swearing a witness and the mode of swearing such witness.

In the proviso to subrule (1) which deals with children, the Commission recommends that the word “**satisfied**” should be deleted and should be replaced with the words “**is satisfied**”. Further, the word “**youth**” was considered misleading as it may capture people aged up to thirty according to Malawi’s Youth Policy. The

Commission hence, recommends that the word should be replaced with the expression “**immature age**”.

RULE 21 [*Recording of Evidence*]

The rule provides for the mode of recording evidence in a Traditional Court. The Commission recommends amendment of the rule to read as follows—

Recording of
evidence

21.—(1) In every trial the evidence shall be recorded in writing in the form of a narrative and in the English language by the Chairperson.

(2) Notwithstanding subrule (1), the Court may receive evidence in the vernacular language of the area in which the court is situate.

(3) At the close of each hearing, the Chairperson shall—

- (a) sign his or her name and the date at the last line of the record; and**
- (b) shall record the time when the sitting of the court ceased.**

RULE 22 [*Doubt regarding jurisdiction*]

The rule provides for situations where the Traditional Court is not satisfied that it has jurisdiction in a particular case and requires such court to send the record to the Chief Traditional Courts Commissioner for directives.

In view of the fact that Local Courts shall be placed within the ambit of the Judiciary, the Commission recommends that the Chairperson should seek directions from the nearest magistrate court since magistrate courts shall remain superior courts to the Local Courts. Furthermore, where it becomes necessary, the Chairperson should then submit the case record and reasons to the magistrate.

The Commission further recommends that where a transfer becomes necessary the adjournment of the case should not exceed sixty days or if the accused is in custody, thirty days.

The Commission thus recommends that the amended rule should read as follows—

Doubt
regarding
jurisdiction
and transfer of
case to a
magistrate
court

22.—(1) If at any stage of a case, whether before the trial starts or during trial, a Local Court is not satisfied that it has jurisdiction to try the case, the court shall—

- (a) refer the matter to the nearest magistrate Court for directions; and**
- (b) if necessary, adjourn the case and submit the case record and the reasons therefore to such magistrate.**

(2) Where a Local Court adjourns and transfers a case to a magistrate court, it shall order the accused to appear before the magistrate court to which the case has been transferred at such time and such place as may be appointed and stated in the presence and hearing of the party or parties or their respective legal practitioners then present, and in the meantime may suffer the accused to go at large, or may commit him to prison, or may release him upon his entering into a bond, with or without sureties, at its discretion, conditioned for his appearance at the time and place appointed before the court to which the case has been transferred.

(3) An adjournment under this rule shall not be for a longer period than is reasonably necessary in the circumstances of the case and shall not in any event exceed sixty days or, if the accused is committed to prison, thirty days; the day following that on which the order is made shall be counted as the first day.

(4) A Local Court may, on application or of its own motion, at any stage in a trial, transfer such trial for hearing before itself at some other place.

RULE 23 [*Adjournment*]

The rule provides for circumstances which may necessitate the adjournment of a case and requires that such adjournment should be for a suitable period.

The Commission considers the use of the word “**suitable**” inappropriate and recommends that it should be replaced with “**reasonable**” which is the commonly used term regarding adjournments.

The Commission further recommends deletion of paragraph (c) which provides for an adjournment where “the case cannot be reached due to lack of time”.

In subrule (4), the Commission recommends insertion of the words “**and time**” immediately after the word “**date**” to ensure that a person is advised of the time when the case shall commence.

RULE 24 [*Cases to be called on date of hearing*]

The rule requires that every case should be called either for mention or hearing on the date fixed for the hearing and should either be disposed of or adjourned. It also provides for the procedure to be followed where an accused or plaintiff does not appear for hearing.

In subrule (1), the Commission considered that the rule encourages unnecessary adjournments since it legislates for the calling of a case for mere mention and recommends deletion of that aspect.

In relation to subrule (2), the Commission recommends that it should be aligned with section 247 of the Criminal Procedure and Evidence Code.

In subrule (3), the Commission recommends incorporation of a period within which the case may be re-instated to improve access to justice.

The Commission thus recommends amendment of the rule and separation of the criminal and civil aspects. The amended rule is to read as follow—

Cases to be
called on date
of hearing

Absence of
parties in civil
case

Absence of
parties in a
civil case

24. Every case shall be called for hearing on the date fixed for the hearing and shall be disposed of or adjourned.

24A.—(1) If the prosecutor is absent or unable or unwilling to proceed with the case against the accused when a case is called for hearing, the Local Court if it is satisfied that the prosecutor has had reasonable notice of the time and place fixed for the hearing shall, unless it considers there is good reason to adjourn the hearing, discharge the accused and such discharge shall not operate as a bar to any subsequent proceeding against the accused on account of the same facts.

(2) If the Local Court is not satisfied as provided in subrule (1) or considers that there is good reason for adjournment, the court shall adjourn the hearing.

24B.—(1) If either party in a civil case does not appear whether after an adjournment or not, when the case is called for hearing the court may give judgment in default for the party who does appear.

(2) If, when the case is called for hearing, neither party appears the Local Court may dismiss the case but without prejudice to re-instating the case within twenty days to hear the matter.

(3) A Local Court may in its discretion in any such case order an adjournment.

(4) Any judgment or order given or made in the absence of a party may, on his application and if good reason for such absence be shown, be set aside and the proceedings may be reheard upon such terms as to costs as the Court shall think fit.

(5) Notice of an application made pursuant to subrule (4) shall be given to the opposite party.

RULE 25 [*Member, etc., of court having interest in case*]

The rule bars any member or assessor from taking part in any proceedings before a court if he is a party or has any personal interest in the proceedings.

The Commission recommends deletion of the word “**member**” and replacement with “**Chairperson**” since he shall be the only presiding officer. Further, subrule (2) should be deleted for irrelevancy.

RULE 26 [*Functions of assessors*]

The rule provides that the duty of assessors is to advise the court on a point or points on which their advice is sought by the Chairman. The Commission considered that the role of assessors is more relevant in civil matters than criminal matters and recommends deletion of the reference to criminal matters.

PART V

PROCEDURE ON TRIAL OF CRIMINAL CASES

RULE 27 [*Hearing of criminal cases*]

The rule provides for the process to be followed when commencing a criminal trial.

The Commission recommends insertion of the words “**read and**” immediately before the word “**explain**” for the logical sequencing of events.

The Commission also observed that in paragraph (b) the accused person is expected to indicate whether he admits contravening the law in taking plea. This is contrary to practice and the Commission recommends deletion of that aspect from the paragraph and from paragraph (c) as well.

The Commission further recommends introduction of subrule (2) to require the court to ascertain, where the accused pleads guilty, that he understands the nature and consequences of his plea. The Commission also considered requiring the Chairperson to record in the narrative any response of an accused to a charge to ensure that a wrong plea is not recorded for purposes of proper assessment on review and recommends accordingly.

The amended rule 27 is to read as follows—

- | | |
|-----------------------------|--|
| Hearing of
criminal case | <p>27.—(1) The hearing of a criminal case shall commence in the following manner—</p> <ul style="list-style-type: none"> (a) the Chairperson shall read and explain to the accused the charge against him; (b) the Chairperson shall ask the accused whether he admits or denies committing the acts alleged; (c) if the accused admits that he has committed the acts complained of, the Chairperson shall record his admission as nearly as possible in the words used by him and shall record a plea of Guilty and in all other cases the Chairperson shall record a plea of Not Guilty. <p>(2) Before a plea of guilty is recorded, the court shall ascertain that the accused understands the nature and consequences of his plea and intends to admit without qualification the truth of the charge against him.</p> |
|-----------------------------|--|

RULE 28 [*Procedure on plea of guilty*]

The rule provides for the procedure to be followed on a plea of guilty. The Commission recommends replacement of the word “**defendant**” with “**accused**” wherever it appears in the rule.

In paragraph (c), the word “**them**” appearing at the very end should be deleted and replaced with the words “**those facts**”.

Paragraph (d) should be deleted for irrelevancy.

RULE 29 [*Procedure at trial*]

This is a very lengthy rule and provides for the procedure to be followed at trial when a plea of not guilty is entered. The Commission analysed the rule and recommends that it should be split into several separate rules to provide for the prosecutions case, the defence case and judgement. The new rules should thus read as follows—

RECAST OF RULE 29

Procedure on plea of not guilty	29. If the accused does not admit the truth of the charge or does not plead guilty, the court shall proceed to hear the case as hereinafter provided.
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Evidence for the prosecution	29A.—(1) In cases where rule 29 applies, the court shall proceed to hear the public prosecutor and to take all evidence as is adduced in support of the prosecution’s case.
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(2) The public prosecutor shall call witnesses to prove the prosecution’s case and, before the witnesses are examined, they shall be sworn or affirmed in accordance with rule 20.

(3) Each witness shall state his name, address and occupation and shall then be examined in Chief by the prosecution and shall answer any relevant questions put to him by the public prosecutor which the court considers proper.

(4) After the examination in chief, the Court shall inform the accused that he is entitled to cross-examine that witness and the accused may ask such questions in cross-examination as the Court considers proper.

(5) The public prosecutor may re-examine each prosecution witness after cross-examination where he or she considers it necessary to do so and the re-examination shall be directed at explaining a matter referred to by the accused in cross-examination only.

(6) Where a new matter is introduced during re-examination by permission of the court, the Court shall

inform the accused of his right to cross-examine the witness on that new matter only.

(7) After the re-examination or cross examination, if any, of each witness the court may examine the witness on any issue in order to discover or obtain proper proof of relevant facts; and the parties may neither object to such examination nor without leave of the court, cross-examine any witness upon any answer given in reply to such examination.

(8) After the public prosecutor has called all his witnesses he shall close the case for the prosecution.

Submission of
no case to
answer

29B. At the close of the evidence for the prosecution the accused or his legal practitioner may address the court for the purpose of submitting that a case has not been made out against the accused sufficiently to require him or her to make a defence and the prosecution shall have the right to reply to such submission.

Procedure on
close of
prosecution
case

29C.—(1) If, upon taking all the evidence from the prosecution and any evidence which the court may decide to call under rule 29A; The Court is of opinion that no case is made out against the accused sufficiently to require the accused to make a defence, it shall deliver a judgment in the manner provided under rule 31 acquitting the accused.

(2) If, when the evidence referred to in subrule (1) has been recorded, the Court is of the opinion that a case has been made out against the accused sufficient to require him to make a defence in respect of the offence charged or some other offence which such court is competent to try, the Court shall consider the charge and if necessary shall amend it subject to rule . . .

(3) The charge, if amended, shall be read to the accused and he shall be asked if he admits or denies the charge.

(4) If the accused does not admit the truth of the charge as amended or if no amendment is made, the accused shall be informed by the court that he has a right to remain silent or to give evidence upon oath and, if he elects to give evidence upon oath, he shall be asked whether he has any witness to examine or other evidence to adduce in his defence.

Evidence for
the defence

29D.—(1) The Court shall then hear the accused and his or her witnesses and before the witnesses are examined they shall be sworn or affirmed in accordance with rule 20.

(2) If the accused states that he has a witness or witnesses to call but that they are not present and the Court is satisfied that—

- (a) the absence of a witness or witnesses is not due to any fault of the accused; and
- (b) that it is likely that the witness or witnesses could give relevant evidence on behalf of the accused,

the Court may adjourn the trial and issue summons to secure attendance of such a witness or witnesses.

(3) Where an accused elects to call witnesses other than himself, his evidence shall be taken before that of any other witness for the defence.

(4) Where the accused elects to give evidence and he refuses to—

- (a) be sworn or affirmed;
- (b) give evidence;
- (c) answer any question lawfully put to him by the public prosecutor or the Court; or
- (d) produce any document or thing which he is required to produce;

such refusal shall be noted by the Court and may be taken into account by it in reaching its decision.

(5) Each witness shall give his name, address and occupation and shall state what he knows about the case and shall be cross-examined by the public prosecutor and re-examined by the accused in the same manner as is provided under rule 24.

(6) After the re-examination, if any, or cross-examination the Court may examine the witness on any issue in order to discover or obtain proper proof of relevant facts and neither party may object to such examination, nor, without leave of the Court, cross-examine any witness upon any answer given in reply to such examination.

(7) After the accused has called all his witnesses, he shall close the case for the defence.

Court's power
to put
questions to
prosecution or
defence witness

29E—The Chairperson may, in order to discover or to obtain proper proof of relevant facts, ask any question, at any time, of any witness or of the parties about any fact relevant or irrelevant and may order the production of any documents or thing.

Addresses

29F.—(1) The prosecution shall be entitled, but shall not be required, to address the court before calling evidence.

(2) At the close of the evidence for the prosecution the accused or his legal practitioner may address the court for the purpose of submitting that a case has not been made out against the accused sufficiently to require him or her to make a defence and the prosecution shall have the right to reply to such submission.

(3) When the accused is called upon to make a defence, he or his legal practitioner may, before his evidence, open his case stating the law on which he intends to rely; and

(b) if the accused gives evidence or witnesses are examined on his behalf, sum up his case.

(4) The prosecution shall have the right to reply on the whole case.

RULE 30 [*Chairman may call as witnesses persons not summoned as witnesses, etc.*]

The rule empowers the Chairperson to call any person as a witness but not summoned as such or ask any person present any questions relevant to the case. The Commission observed that the rule lacks the usual caution to the court in the exercise of this power to prevent the taking over of the case by the court. The Commission considered that this position could be rectified by replacing the word “**relevant**” with “**essential**”.

Further, the phrase “whether or not anyone requests it” appearing in the first line should be deleted.

RULE 30A [*Inquiry by court as to unsoundness of mind*]

The rule provides for the procedure to be followed when a court suspects that an accused is of unsound mind. The Commission observed that the process outlined in the rule is ordinarily conducted at the early stages of the trial.

The Commission thus considered that inquiries of this nature should be transferred to the nearest magistrate court and recommends accordingly.

RULES 30B, 30C and 30D

These rules deal with the defence of insanity and how to handle matters where the defence is raised. The Commission recognized that since such matters would be transferred to magistrate courts under rule 30A, 30B, 30C and 30D become redundant and should be deleted.

RULE 30E [*Alteration of charge etc*]

The rule provides for situations where a court may alter a charge against an accused person. The Commission retained the rule but recommends that it should be shifted to appear immediately after rule 27.

RULE 30F [*Application of rule 30E*]

The rule lists down the Traditional Courts where the processes under rule 30E shall apply. The Commission recommends deletion for irrelevancy.

PART VI

PROCEDURE ON CONVICTION, DELIVERING JUDGMENT, ETC

RULE 31 [*Recording and delivery of judgement*]

The rule provides for the mode of recording and delivering a court judgment. The Commission recommends that the rule should be amended for better presentation and clarity to read as follows—

Recording
and delivery
of judgement

(1) The Court, having heard both the prosecution and the accused and their witnesses, and their submissions, if any, shall deliver a judgment, either forthwith or on such a day as it may appoint within a reasonable period.

(2) Every judgment shall be recorded in writing and shall contain the reasons for it and shall be signed by the Chairperson who shall deliver it in open Court.

(3) Where the Court, after considering all evidence properly before it, is of the opinion that there is doubt regarding the guilt of the accused, the Court shall acquit the accused of the offence charged.

(4) If the Court acquits the accused, the Court shall, provided no other charge is pending against him, forthwith release the accused.

(5) Where the Court, after considering all the evidence properly before it, is satisfied that the offence is proved beyond reasonable doubt against the accused it shall convict the accused of the offence charged.

(6) If the Court convicts the accused the Court shall record the conviction and pass sentence or make an order against him according to law either forthwith or on such a day as the Court may appoint within a reasonable period.

RULE 32 [*Passing of sentence*]

The rule provides for the procedure to be followed by the court before passing a sentence.

The Commission recommends amendment to align the rule with the proposals to amend section 260 of the Criminal Procedure and Evidence Code as recommended in the Law Commission Report on the Review of the Criminal Procedure and Evidence Code at page 122⁵⁷.

The amended rule shall read as follows—

⁵⁷Malawi Government Gazette Supplement, 18th December, 2003

Passing of
sentence

32.—(1) The court may, before passing sentence, receive sentence such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed.

(2) Evidence that the court may receive under subsection (1) may, in addition to the evidence of the accused or the prosecution, include evidence by or on behalf of the victim of the offence and any relevant reports to enable the court assess the gravity of the offence.

(3) The sentence of the court shall be recorded in writing and signed by the Chairperson, together with the reasons for it, and such sentence and reasons shall be delivered in open court in the presence of the accused.

RULE 33 [*Person not to be punished twice for same offence*]

The Commission recommends that the language of the rule should be aligned with the language in section 42 (2) (f) (vii) of the Constitution to read as follows—

Person not to
be prosecuted
twice for the
same offence

33. No person shall be prosecuted twice for a criminal act or omission of which he or she has previously been convicted or acquitted.

RULE 34 [*Right to appeal to be explained*]

Retained.

RULE 35 [*Binding over to appear for judgment*]

The Commission recommends that the rule should be redrafted into two subrules for better presentation as follows —

Binding over to
appear for
judgement

35.—(1) The bond to be entered into by any person ordered under section 20 (7) to enter into a bond to keep the peace and be of good behaviour shall be in Form 27 in the First Schedule.

(2) The bond shall be signed by such person and the sureties, if any, in the presence of the Chairperson who shall thereupon himself sign it.

RULE 36 [*Warrant for sentence of imprisonment*]

The rule empowers a clerk of a sentencing court to issue a warrant for sentence of imprisonment. The Commission considered the conferment of such powers on a clerk of court as inappropriate and recommends deletion of this aspect from the rule.

Further, the Commission recommends an extension to the rule to allow the court some discretion in the execution of the warrant. The Commission also recommends that for purposes of clarity, the marginal note should be amended to read “**Warrant of committal for sentence of imprisonment**”.

The Commission thus recommends that the rule should be amended to read as follows—

Warrant of committal for sentence of imprisonment **36.—(1) A warrant in Form 7 in the First Schedule signed by the Chairperson of the Court by which any person has been sentenced to imprisonment, ordering that the sentence shall be carried out in a specified prison within Malawi shall be full authority to the officer in-charge of such prison and to all other persons for the carrying into effect of the sentence described in such warrant unless the court specifies otherwise.**

Cap.7:01 **(2) Subject to section 35 of the Penal Code every sentence of imprisonment shall be deemed to commence from, and to include, the whole of the day on which it was pronounced unless the Court specifies otherwise.**

The Commission further recommends introduction of a new rule to provide for sentences which Local Courts may pass in terms of a sentence of imprisonment. The new rule should incorporate aspects of rule 36(3) with the following marginal note: **Sentences which a local court may pass.** Upon further reflection the Commission observed that this rule contains substantive issues and should properly be incorporated in the main Act and recommends accordingly.

The new rule is to read as follows—

Sentences which a local court may pass **36A. The aggregate of any terms of consecutive sentence of imprisonment which a Local Court may impose on an offender shall not exceed two years.**

Committal of case to a magistrate for sentencing **(1) Where in a trial by a Local Court a person is convicted of an offence, if the court is of the opinion that greater punishment should be inflicted for the offence than it has power to inflict, the court may, for reasons to be recorded in writing on the record of the case, instead of dealing with him in any other manner, commit him to an appropriate magistrate court for sentencing.**

(2) Any person committed to a magistrate court for sentence under this rule shall be brought before the court to which he has been committed at the first convenient opportunity.

(3) When a person is brought before a magistrate court for sentencing in accordance with subrule (3), the magistrate court shall inquire into the circumstances of the case and shall thereafter proceed as if such person had pleaded guilty before it of the offence in respect of which he has been committed.

RULE 37 [*Order to perform public work*]

The rule provides for the mode of issuing an order to perform public work and empowers a clerk of Court to issue such order. The Commission considers the power conferred on the Court Clerk inappropriate and recommends that such powers should be removed. The Commission further recommends deletion of any reference to the Convicted Persons (Employment on Public Work) Act in the provision in view of its earlier recommendation regarding that Act⁵⁸. The Commission thus recommends that the provision should rather refer to “any other written law”.

Secondly, the Commission recommends incorporation of “**Community Service Orders**” in view of the Community Service Rules promulgated within the last five years.

The amended rule is to read as follows—

Order to
perform public
work or
community
services
Cap.8:01

37. An order in Form 8 in the First Schedule signed by the Chairperson of the Court by which any person has been ordered to perform public work under any written law or under sections 339 to 340 of the Criminal Procedure and Evidence Code to perform Community Service shall be full authority for the employment of such person on public work or community service under the provisions of the respective Acts.

PART VII PROCEDURE ON TRIAL OF CIVIL CASES

RULE 38 [*Procedure on hearing*]

The rule provides for the procedure to be followed on hearing of a civil case. The Commission observed that there are some customary procedures which are inconsistent with the Constitution in particular those that discriminate against women. Two examples were cited: the practice of a female spouse being denied the right to sue and the practice of allowing a female spouse to sue the father-in-law instead of the husband.

The Commission recommends that a new subrule (2) should be incorporated under this provision to prohibit repugnant customary practices. The new subrule 2 is to read as follows—

(2) Where the customary law prevailing in the area in relation to the civil matter at hand is discriminatory or repugnant to justice, the Local Court shall have regard to the Constitution and principles of human rights.

RULE 39 [*Certificate of Divorce*]

Retained.

RULE 40 [*Judgement delivered in absence of party*]

Retained.

RULE 41 [*Right of appeal to be explained*]

⁵⁸See page 45 of the Report.

Retained.

PART VIII

ARREST, CONTEMPT OF COURT, AND ENFORCEMENT OF JUDGEMENTS

RULE 42 [*POWERS OF ARREST BY COURT MESSENGERS*]

The rule empowers court messengers to arrest any person named in a warrant or order issued by a court or in the manner laid down in section 20 of the Criminal Procedure and Evidence Code.

The Commission recognized that the power conferred on the messenger to arrest persons is properly exercised by police officers and may be abused if exercised by the court messengers and considered removing these powers. It was however realized that there is a need to balance between the potential by court messengers to abuse these powers and the need to ensure enforcement of Local Courts warrants or orders bearing in mind the shortage of police man power.

The Commission recommends retention of the power by messengers on that basis.

RULE 43 [*Liability for contempt of Court*]

The rule provides for circumstances under which a person may be charged with contempt of court contrary to section 19 of the Act. The Commission recommends that the rule should be incorporated under section 19. The Commission further recommends redrafting of section 19 and this has been included in the proposed Bill.

RULE 44 [*Power of Court to enforce judgement of other courts*]

The Commission recommends that the rule should be turned into a subsection (2) of section 37 of the Act.

PART IX

FINES AND FEES

RULE 45 [*Payment of fines*]

The rule provides that all fines imposed by and all fees payable to a Traditional Court shall be paid to the clerk of such court who shall dispose of the same in accordance with the directions of the Chief Traditional Courts Commissioner.

First, the Commission considered the provision substantive and ill placed in the Rules which should ideally provide for matters of procedure. The commission thus recommends that the provision should be incorporated in the main Act.

Second, the Commission observed that the marginal note only mentions fines though the provision is covering both fines and fees. The Commission thus recommends amendment of the marginal note to reflect both fines and fees.

Third, the Commission was aware that fines have always been treated as Government revenue for the Consolidated Fund while as fees are payable to the Registrar of the Court to facilitate court operations. The Commission thus saw the

need to differentiate the handling of the two issues. The Commission thus recommends incorporation of the following two provisions in the main Act.

Payment of Fines	All fines imposed by a Local Court shall be paid to the clerk of such court who shall deposit the same into the Consolidated fund.
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Payment of Fees	All fees payable to a Local Court shall be paid to the clerk of such court who shall dispose of the same as from time to time directed by the Registrar of the High Court.
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RULES 46-50

Retained.

RULE 51 [*Exemption from fees*]

The rule exempts the Government and District Councils from paying any fees prescribed by the Rules.

The Commission recommends deletion of the reference to “District Council” and replacement with “**local government authority**” which is broader and is the common usage now.

TRADITIONAL COURTS (ENFORCEMENT OF JUDGEMENTS) RULES

Under S.40

These rules make provision for enforcement of judgements in both criminal and civil matters. The Commission considered each rule in turn and made the following observations and recommendations.

PART I PRELIMINARY

RULE 1 [*Citation, application and commencement*]

The rule provides for the style of citing these rules and how and where they may apply.

In subrule 1 the Commission recommends replacing the word “Traditional” in line 1 with the word “**Local**” to reflect the new name by which the courts will be known.

In subrule 2 the Commission observed that the rules were to apply in whole or in part and in specific areas as were to be notified by the Chief Traditional Courts Commissioner. The Commission could not fathom the reason for such discrimination of areas of application and resolved that the rules should simply apply to all Local Courts.

RULE 2 [*Interpretation*]

“bailiff”

The Commission recommends that the definition be amended to read as follows—

“bailiff” means a person appointed by the **Sheriff of Malawi** under these Rules to execute sale orders.

“Chairman”

The Commission recommends deletion of this definition for irrelevancy.

“Creditor”

The Commission recommends for purposes of clarity and avoidance of doubt the insertion of the word “**judgement**” before the word “**Creditor**” so that the definition now reads as follows—

“**judgement Creditor**” means a person in whose favour an award of compensation or any other order has been made under section 15 of the Act.

“debtor”

The Commission recommends, again, for purposes of clarity and avoidance of doubt the insertion of the word “**judgement**” before the word “debtor so that the definition reads as follows—

“**judgement debtor**” means a person ordered to pay a fine, compensation or other sum of money or to deliver, transfer or restore to a creditor any specific property under Section 14, 16 or 17 of the Act.

PART II

SEIZURE AND SALE BY BAILIFF

RULE 3 [*Appointment and payment of bailiff*]

The rule provides for the appointment of bailiffs, the assignment of such bailiffs to areas in which to work and the payment of salaries to such bailiffs.

The Commission recommends replacing the word “**Chief Traditional Courts Commissioner**” in line 1 of subrule (1) with the word “**Sheriff**”. The Commission considered the question as to who should be appointed bailiff. The Commission considered the fact that in the magistracy, court marshals who are public officers are used to execute judgements. The Commission also considered that cost implications should be borne in mind in deciding whether bailiffs should be public officers or private individuals.

It was further noted that in the Traditional Courts, bailiffs were not used over much as normally recourse used to be had to s.20 of the Traditional Courts Act for enforcement of judgements.

The Commission, bearing in mind the above considerations, resolved that the issue of who should be bailiffs and their remuneration may best be left to the Sheriffs Act, Cap 3:05. The Commission nonetheless recommended that subrule 1 should be amended to provide only for assignment of bailiffs by the Sheriff. The Commission therefore recommends subrule 1 to read as follows—

(1) The Sheriff shall assign to each bailiff appointed under the Sheriff's Act the area in which he will perform his functions.

RULE 4 [*Application for the issue of sale order to be carried out by bailiff*]

The rule makes provision for the issue of a sale order. The Commission observed that in subrule 1, the issue of these Rules being applicable to specific areas would have to be deleted in view of the Commission's recommendation under Rule 1(2) that these rules would apply to all Local Courts in all areas. Further, the Commission recommends that the word "**judgement**" should be inserted between the words "**a**" and "**creditor**" in line 1 of subrule (1).

The Commission also recommends insertion of the word "any" between the words "**where**" and "**such**" in paragraph (b) of subrule 1.

The Commission considered the provision of subrule 4 which appears to give a court power to make a sale order in respect of property owned by a person on whom a fine has been imposed without giving such a person a chance to plead his case as to means. The Commission was of the view that the person fined should be examined as to means so that where he is able to pay the fine, he should be able to do so and seizure of his property should be resorted to only in default of payment of fine. The Commission further felt that in case of a fine under a criminal matter, the convict should be asked to state what property he or she has which may be levied but that in civil matter, there would be no such need.

In subrule (5), the Commission recommends replacing the words "**Traditional Court**" in line 4 with the words "**Local Court**". Again in the proviso to the subrule the words "**Traditional Court**" in line 1 are to be replaced by the words "**Local Court**". In subrule (6) the Commission recommends that the provision would not be ideal in civil matters as an appeal does not grant a stay of execution. The Commission therefore felt that the rule should apply to appeals in criminal matters especially bearing in mind the fact that the rule refers to "**compensation or fine**". The Commission also noted that the words "**Traditional Courts Commissioner**" would have to be deleted and does so recommend. The Commission considered which court between the court against whose order an appeal is lodged and the court to which such appeal lies should replace the Traditional Courts Commissioner as the authority to grant the order for the issue of a sale order when an appeal is pending. The Commission recommends that it should be the court which made the order for compensation or fine. The Commission therefore recommends subrule 6 to be amended to read as follows—

(6) No sale order shall without the written order of the Home or Away court as the case may be, issue in a criminal matter in respect of any compensation or fine regarding which an appeal is pending.

RULE 5 [*Transmission of sale order to bailiff*] and RULE 6 [*Receipt of sale order by bailiff*]

The Commission considered these two rules together.

Rule 5 provides for the transmission of a sale order to a bailiff and the recording of such transmission by the transmitting court on its file. Rule 6 provides for what the bailiff should do upon receipt of the sale order transmitted under Rule 5. The Commission was of the view that the two rules should be merged as they relate to the same process and did recommend that the marginal note for the recast rule should be “**Transmission to and receipt by bailiff of sale order**”

The Commission further noted that Rule 5 (2) as it stands requires the Home Court to endorse its file copy of the sale order with details of the bailiff, the date on which it was sent and the method of sending the copies. The Commission felt that it would be proper that such endorsement should apply to even the copies being transmitted to the bailiff. This would curb mischief which may delay execution or result in non-execution of a sale order. The Commission further observed that it might be better if there was a time limit set within which a sale order must be transmitted to a bailiff and recommends the period of **three days**.

The Commission also recommended that where a sale order is to be executed by an Away Court, the sale order should be sent to the Away Court which should then identify the appropriate bailiff or sheriff to execute such order. The Commission, however, also observed that depending on the geographical positions of the Home and Away Courts, there could be situations where a Home Court bailiff may be better placed to execute a sale order that would otherwise be executed by an Away Court bailiff because the property in question lies within the jurisdiction of the Away Court. The Commission recommends that the recast rule should capture this situation.

In the circumstances, the Commission recommends the rule to read as follows—

Transmission
to and receipt
by bailiff of
sale order

5.—(1) One copy of the sale order shall be filed at the Home Court and two copies of the sale order shall be sent to the appropriate bailiff within three days by the most speedy and convenient means.

(2) The clerk of the Home Court shall endorse all the three copies of the sale order by inserting, as provided in each copy,—

(a) details of the name and address of the bailiff;

(b) the date upon which the two copies sent to the bailiff were sent to such bailiff; and

(c) the method by which the two copies were sent.

(3) Upon receipt of the copies of a sale order the bailiff shall endorse both copies by inserting details of the hour, the date, month and year they are received by him.

(4) Where the sale order is to be executed within the area of jurisdiction of the Home Court the bailiff shall proceed in accordance with rules 7 and 8.

RULE 7 [*Service and execution of sale order*]

The rule provides for the procedure for both where the bailiff does seize property and where he or she is unable to find any property. The Commission observed that since the sale order may be executed by either a Home Court or Away Court bailiff, the rule should clearly state the procedure for dealing with a sale order which was sent to an Away Court but which has been endorsed as having been not executed for want of property.

In view of the above the Commission made two recommendations. Firstly, that the rule as it stands be extended to include reference to Away Court as regards an endorsed sale order by adding the phrase “**or Away Court whichever is applicable**” immediately after the word “**court**” at the end of the last line of the rule and, secondly, that the rule be split into two subrules:

- (i) subrule 1 to be the current Rule 7 subject to the amendment above; and
- (ii) subrule 2 to deal with what the Away Court should do with a returned endorsed sale order. The Commission recommends subrule 2 to read as follow—

(2) where the endorsed sale order is returned to the Away Court, then the Court shall transmit the sale order to the Home Court.

RULE 8 [*Powers of bailiff when executing sale order*]

The rule provides for powers of the bailiff in the execution of a sale order with particular regard to the time when and how entry to premises in which property to be seized is contained may be made and what property may be seized. The Commission, noted that paragraph (b) allows the bailiff to break inner doors of a building where the debtors property is situated without any suggestion that this should be the case where the debtor or any person in charge of such building has refused the bailiff access. The Commission however also considered the need to ensure that bailiffs are not unduly hindered in their work by requiring that they should only break inner doors of a building only if the debtor refuses to allow them entry when the circumstances of a particular case may require such breaking.

In the circumstances the Commission recommended that the rule, especially paragraph (b) be recast in the mould of the provision of s. 21 (2) of Criminal Procedure and Evidence Code. The rule would now read as follows—

**Powers of
bailiff when
executed sale
order**

8. (1) The bailiff shall have the following powers when executing a sale order—

- (a) he may enter any dwelling house or other place between hours of 6 a.m. and 6 p.m.;
- (b) he may break open the inner doors of any building where the debtor’s movable property is situate;

- (c) he may break open the outer door or doors of any dwelling-house or other places where the debtor's movable property is situated if so authorized by an order of the Court in whose area of jurisdiction the debtors property is situate;
- (d) he may, subject rule 27, take away any movable property which he has reason to believe to be the debtors property.

RULE 9 [*Procedure by bailiff after seizure*]

The rule provides for how the bailiff deals with the seized property.

The Commission recommends retention of subrule 1. The Commission noted that subrule 2 does not seem to allow the debtor to be given notice that the sale of seized property would be done after 10 days from the date of seizure. The Commission considered that it would be fair if the debtor were given such notice and recommends that a Form, similar to Form 21 in the First Schedule, should be introduced in this rule. The Commission further recommends that the proposed Form should replace the current Form 17 and that it should incorporate an inventory of the seized property.

The Commission recommends retention of subrules 3, 4 and 5. However under subrule (3), the Commission considered that the supply of a copy of the inventory of property seized should not be on the request of the debtor but rather it should be the rule. The Commission thus recommends deletion of the words "on request" appearing at the end of that rule.

In subrule (5) it was observed that there was need to specify a new amount of money beyond which there would be need to hold a public auction. It was further noted that in the second proviso to subrule (5), there was an obvious typographical error in the word "**immediately**" in line 2 of the proviso. It was recommended to be corrected to read "**immediate**".

In subrule 6, the Commission noted that the auction sale would be held by the bailiff or a licenced auctioneer employed by the bailiff.

The Commission observed that the bailiff or licensed auctioneer would have to be appointed by the Sheriff and therefore recommended amendment of the subrule by replacing the phrase "**employed by him**" with the phrase "**appointed by the Sheriff**". The Commission further recommends that the bailiff or licensed auctioneer should be required to complete a Form to be provided in the Second Schedule to indicate all the items sold and the price at which each item has been sold.

The Commission however wondered as to who would be best placed to conduct the sale between an auctioneer and a bailiffs' auctioneer bearing in mind that licensed auctioneers may not be readily available in rural areas where most of these courts will be situated. The Commission considered a proposal that perhaps the Sheriff's Act ought to be amended to provide for the appointment of rural

auctioneers for purposes of subrule 6. Another proposal considered was that auctioning could be done by bailiffs appointed from among court staff. In the end the Commission concluded that the matter be left to the Sheriff.

In subrule 7, the Commission recommends that the words “**Chief Traditional Courts Commissioner**” in line 1 be replaced with the word “**Sheriff**”. Further, the word “**auctions**” in line 4 was noted to be an obvious error and the Commission recommends correction so that it reads “**actions**”.

The Commission recommends that rule 9 should read as follows—

Procedure by
bailiff after
seizure

9.—(1) Subject to the directions of the Home Court or Away Court, the bailiff may deal with the goods seized in execution of a seizure sale order in his discretion either by depositing them in some fit place or by leaving them in the custody of a fit person who shall be put in possession by the bailiff.

(2) No property seized under a sale order may be sold until more than ten days after the day on which the property was seized and the debtor has been given notice of the intended sale unless the property is of a perishable nature or the debtor requests otherwise in writing.

(3) The bailiff shall make in triplicate an inventory of all the debtor’s property seized under the sale order in Form 3 in the Second Schedule and shall supply one copy of the inventory to the debtor.

(4) The bailiff shall serve upon the debtor and the clerk of the Local Court in whose area of jurisdiction the property is seized notice in writing of the time and the place where the property is to be sold and such notice shall be in Form 4 in the Second Schedule and shall be served upon the debtor and the clerk of the Local Court at least 24 hours before the time fixed for the sale and no sale shall, subject to subrule (5), take place (whether by auction or by private treaty) unless such notices have been so served:

Provided that if the bailiff is unable to effect prompt personal service on the debtor he shall effect service on the debtor by leaving a copy of the notice with an adult person who is resident at or near the place where the property was seized, or if no such adult person is at such place by leaving a copy of the notice in a conspicuous position at that place.

(5) Where the sale order issued is for an amount of more than K5,000, the sale shall be by public auction:

Provided that upon application of the bailiff, and with the consent of the debtor, the Home or Away Court may order otherwise:

Provided further that where the property seized is of a perishable nature and where immediate sale appears necessary to preserve its value to the debtor, the Court in whose area of jurisdiction the property was seized may, upon application by the bailiff, order an immediate sale by auction or otherwise.

(6) Where the seized property is to be sold by auction, the sale shall be held by the bailiff or a licensed auctioneer appointed by the Sheriff and such bailiff or auctioneer shall complete a Report of Sale in Form 9 in the Second Schedule indicating all the debtor's property sold and the price of each item.

(7) The bailiff and such auctioneer shall be entitled to fees and expenses in accordance with the scales set out in the Third Schedule:

Provided that the Sheriff may disallow all or any part of the fees and expenses of a bailiff and auctioneer in any case where such fees and expenses or any part thereof relate to unnecessary or excessive actions taken by the bailiff or auctioneer in the execution of the sale order.

RULE 10 [*Place of Sale*]

The rule provides that sale of seized property should be held in the District in which the property was seized except where upon application by the bailiff or the creditor or the debtor the Chief Traditional Courts Commissioner orders otherwise.

The Commission recommends replacing the words “**The Chief Traditional Courts Commissioner**” with the word “**Sheriff**”. The Commission further observed that for the purposes of record it would be best if the application by bailiff, creditor or debtor to vary the place of sale were to be made in writing. The Commission therefore recommends insertion of the words “**in writing**” between the words “**application**” and “**of**”.

RULE 11 [*Disposal of proceeds of sale*]

The rule provides for disposal of proceeds of sale. Subrule (1) gives power to the bailiff to deal with proceeds of sale as directed by the Chief Traditional Courts Commissioner. The Commission observed that it was not proper for the bailiff to have power to dispose of proceeds of sale and that the subrule was therefore misleading. The Commission recommends deletion of this subrule. The Commission then considered subrule (2) under which the bailiff, creditor and debtor may be paid out of the proceeds of sale. The Commission observed that it would be better if the subrule were to be split into paragraphs to achieve clarity and simplicity. To that end, the Commission recommends that the subrule should be divided into three paragraphs to deal with—

- (a) payment to bailiff;
- (b) payment to creditor; and
- (c) payment of any surplus to debtor.

The Commission further observed that there is need to make provision to stipulate how and within what period proceeds of sale should be remitted to the

office of Sheriff. In this regard, the Commission recommends that the proceeds of sale should be deposited in the Sheriffs account within seven (7) days from the date of sale.

The Commission further noted that the proviso to subrule (2) did not qualify to be an exception and should simply be another substantive subrule. The Commission also recommends that the words “**Chief Traditional Courts Commissioner**” be replaced with the word “**Sheriff**” in view of its earlier recommendation regarding the responsible office in these matters.

In subrule (3), which deals with an inventory showing the amount for which each item was sold, the Commission observed that the debtor did not seem to be accorded opportunity to check what the inventory contained and verify the entries. This was considered to be a rather significant omission which could be to the detriment of the debtor. The Commission therefore recommends that a provision be included to require the debtor to attend the sale and countersign the inventory so that he or she would know whether he or she was entitled to any surplus at all. The Commission therefore recommends adding the words “**and the debtor**” immediately after the word “**date**” in line 5 of the subrule.

The Commission further noted that there was need to ensure that the amount remitted to the Sheriff and the amount reflected in the inventory was the same. It was thus recommended that the inventory needed to be copied to the Sheriff as well.

Finally, the Commission noted that the inventory may either be sent to the Home or Away Court depending on the jurisdiction under which the bailiff who executed the sale order fell. The Commission therefore recommends insertion of the words “**ör Away**” between the words “**Home**” and “**Court**” in line 2 and in line 6 respectively.

Consequently, the amended rule 11 shall read as follows—

Disposal of
proceeds of
sale

11.—(1) Upon completion of a sale, the proceeds shall be deposited in the Sheriff’s account within seven days and the Sheriff shall arrange –

(a) for the payment to the bailiff of the bailiff’s fees;

(b) for the payment to the judgment creditor of the amount payable under the sale order;

(c) subject to section 43 of the Bankruptcy Act, for any surplus to be paid to the judgment debtor.

(2) Where two or more sale orders have been received by the same bailiff in respect of the judgment debtor prior to the seizure of any property under any of the orders and the proceeds of sale, after paying the bailiff’s fees and expenses, are insufficient to pay in full all the sums due, the Sheriff shall arrange payment rateably.

(3) Upon completion of the sale, the bailiff shall send to the Home Court, the Sheriff and the debtor one copy of each of the inventory showing separately the amount for which each item or group of items of the judgment debtor's property was sold, which copy shall be countersigned by the clerk of court who attended the sale.

(4) The bailiff shall, at the same time as he sends the inventory to the Home Court, return to the Home Court and Away Court, where applicable, one copy of the sale order endorsed as provided in Form 3 in the Second Schedule.

(5) The Clerk to the Home Court shall indorse on the copy of the sale order originally filed at the Home Court the date upon which the sale order was received from the bailiff, and the amount notified to him to have been paid to the judgment creditors.

PART III SEIZURE BY COURT

The rules in this part provide the procedure to be followed where the seizure of property under a sale order or transfer order is to be done by Court.

RULE 12 [*Interpretation*]

“Property”

The Commission recommends replacing the words “**Chief Traditional Courts Commissioner**” with the words “**Chief Justice**”.

RULE 13 [*Chief Traditional Courts Commissioner may empower Courts to issue sale order and transfer order and may direct what property to be seized*]

In subrule (1), the Commission noted that the courts would have inherent power to issue transfer orders and recommends deletion of reference to the Chief Traditional Courts Commissioner. The Commission recommends subrule (1) to read as follows—

(1) A Local Court may issue a transfer order for the purpose of seizing from a debtor and transferring to a creditor property to which the judgment creditor is entitled under an order under section 17 of the Act or property to be transferred at a valuation.

In subrule (2), the Commission had the same view as expressed under subrule (1) above and recommends that the subrule be reworded to read as follows—

(2) A Local Court may issue a sale order under this Part for the purpose of seizing property from a judgment debtor for sale in order to satisfy in whole or in part an order for payment of a fine or compensation payable in money under section 16 or 17 of the Act.

In subrule (3), the Commission recommends replacing the words “**Chief Traditional Courts Commissioner**” in line 1 with the words “**Chief Justice**”

RULE 14 [*Applications to Court*]

The rule provides for the procedure by which a creditor may apply to Court to have a transfer order issued. The Commission noted that the rule was in order and recommends to retain it. The Commission however observed that the manner in which such application may be made is provided in Forms 19 and 20 which appear as marginal notes to subrules (1) and (2) but do not appear in the bodies of the subrules themselves. The Commission therefore recommends as follows –

(a) in subrule (1)—

(i) to delete the word “**prescribed**” between the words “**the**” and “**manner**” in line 4;

(ii) insert the phrase “**prescribed in Form 19**” between the words “**manner**” and “**to**” in line 4.

(b) in subrule (2)

(i) to delete the word “**prescribed**” appearing between the words “**the**” and “**manner**” in line 6;

(ii) insert the phrase “**prescribed in Form 20**” between the words “**and**” and “**to**” in line 6.

The Commission found subrule (3) to be superfluous as the power to issue transfer orders would be general powers of all courts in these rules and recommends that the subrule be deleted.

In subrule (4), the Commission noted that the prescribed manner of making an application is actually contained in Form 15 which is referred to in Rule 15 (2). The Commission therefore recommends that Form 15 be incorporated in subrule (4) to achieve consistency and clarity. The Commission therefore recommends as follows—

(i) to delete the word “**prescribed**” appearing at the beginning of line 6;

(ii) insert the words “**prescribed in Form 15**” between the words “**manner**” and “**to**” in line 6.

The Commission recommends deletion of subrule (5) for the same reasons given for deletion of subrule (3).

RULE 15 [*Manner of applying to Court and duties of applicant*]

The rule provides for the manner in which an application for a sale order or a transfer order may be made. The Commission noted that subrule (1) and subrule (2) relate to the same substance; the difference being only that subrule (1) relates to a transfer order and subrule (2) relates to a sale order. The Commission was of the view that the two subrules be combined into one subrule and the Commission recommends that the new subrule reads as follows—

(1) An application for a transfer order or a sale order shall be made to the Chairperson in chambers.

In subrule (3) the Commission observed that under paragraph (c) there was need for the applicant to provide a proper description of the debtor's property for ease of identification by the court. The Commission recommends that paragraph (c) be reworded to read as follows—

(c) such property belongs to the judgment debtor and provide sufficient description of the property for easy identification by the Court.

Under paragraph (d) the Commission considered whether the fact that an applicant accompanies court officers to the place of seizure would not create friction between the applicant and the debtor. The Commission however concluded that this process may actually lead to an amicable settlement of the dispute. It was however recommended that the creditor should not be allowed to point out the property to be sold to avoid friction. The Commission therefore recommends retention of the paragraph.

The Commission considered paragraph (e) and concluded that it would be best if the paragraph were to be a subrule on its own. The Commission therefore recommends deletion of the paragraph and in its place create a new subrule (3) which should read as follows –

(3) Before making a sale order or a transfer order, the Court shall satisfy itself that the applicant understands his or her liabilities under these rules if a dispute should arise regarding the ownership of the property.

The Commission recommends retention of subrule (4).

RULE 16 [*Making of sale order and transfer order*]

The Commission recommends retention of this rule but with appropriate amendment to terminology so that the word “**Chairman**” is replaced with the word “**Chairperson**”.

RULE 17 [*Processing of sale order and transfer order*]

The rule provides for the procedure for processing of a sale order or transfer order.

In subrule (1), the Commission recommends improvement in the language and recommends that the subrule should read as follows—

(1) A sale order and a transfer order shall be prepared in triplicate and signed by the Chairperson, one copy of which shall be retained on the file of the Court and two copies shall be issued to officers of the court directed to carry out the order.

In subrule (2) the Commission saw the need to set a definite time limit within which a sale order or transfer order should be carried into effect and recommends a period of **seven days**. In consequence, the Commission recommends replacing the phrase “**without delay**” in line 3 of the subrule with the phrase “**within seven days**”.

RULE 18 [*Seizure of property*]

The rule provides for the procedure in the actual process of seizure.

The Commission noted the reference to members of court under subrule (1) and recommends deletion of this reference in view of its earlier recommendation regarding composition of Local Courts⁵⁹.

The Commission observed that under subrule (2) it might be necessary that the debtor and the applicant be invited by the court officer to agree on the value of the property to be seized. The Commission therefore recommends that the subrule be appropriately amended to reflect this position.

In subrule (4) the Commission considered that the officer of court should only take away the property if the value of the property can not be agreed upon between the debtor and the creditor. The Commission thus recommends recasting of the subrule in this regard.

Consequently, the rule should read as follows—

Seizure of
property

18. (1) A transfer order or a sale order shall be carried into effect property by one or more officers of the court accompanied by an assessor and the applicant or his fully authorized representative if he so wishes.

(2) On arrival at the place indicated by the applicant or his representative, an officer of the court shall inquire whether the defendant whose property is to be seized is present and if he can be found shall serve on him a copy of the transfer order or sale order.

(3) After effecting service under subrule (2), an officer of court or assessor shall explain the purpose of the visit and the applicant shall, where appropriate, agree with the judgment debtor on the property to be seized and the value of such property.

(4) Where an agreement cannot be reached between the applicant and the judgment debtor, the assessor shall make such inquiries as he considers desirable to determine what property to seize to ensure that the proposed seizure appears reasonable and proper and shall then instruct the officer of the court what property to seize.

(5) If the judgment debtor whose property is to be seized cannot with due diligence be served personally with the transfer order or sale order, the assessor shall require the applicant or his representative to point out the property to be seized.

(6) Where subrule (5) applies, the assessor shall make inquiries as he considers desirable to ensure that the proposed seizure appears reasonable and proper and shall then instruct the officer of the court what property to seize, and deliver a copy of the transfer order or sale order to an adult person who

⁵⁹See page 19 of the Report

is a resident at or near the place for transmission to the debtor or, if no such adult person is at the place, shall leave a copy of the transfer order or sale order in a conspicuous position at the place.

(7) The officer of the court shall seize and take away the property indicated in the instructions given to him by the assessor and shall return with such property to the Local Court.

(8) An officer of the court shall for the purpose of seizing property have all the powers of a bailiff under rule 8.

PART IV

VALUATION, TRANSFER AND SALE BY COURT

The rules in this part provide for how the Court deals with property seized under a transfer order for transfer to a creditor at a valuation and the transfer of property seized but which is to be transferred to the debtor otherwise than at a valuation.

RULE 19 [*Valuation*]

The rule provides for procedure where the value of the property to be transferred at a valuation is agreed between the debtor and the creditor who has applied for the transfer as well as where the creditor and debtor do not agree on the value of the property. The Commission recommends retention of subrules (1) and (2).

The commission noted that subrule (3) is simply a continuation of enumeration of procedure that starts in subrule (1) and that the paragraphs under subrule 3 could therefore stand as independent subrules. The Commission therefore recommends that the opening sentence of subrule (3) which starts with the words “**The property...**” be deleted. In consequence, it was recommended that—

paragraph (a) should become subrule 3;

paragraph (b) should become subrule 4.

The Commission recommends the insertion of the words “**the Chairperson**” between the “comma” and the word “**shall**” in line 2 of paragraph (b) such that the new rule 3 reads as follows—

(3) If the valuation of the property has been agreed upon between the judgment debtor and the applicant, the Chairperson shall cause the particulars thereof to be recorded as the value fixed by the court on the copy of the transfer order on the court file and shall sign it and another copy of the transfer order which shall be delivered to the applicant.

The new subrule 4 would read as follows—

(4) If no valuation of the property seized has been agreed upon between the debtor and the applicant, the Chairperson, with the assistance of the assessor and after hearing anything which the judgment debtor and the applicant or either of them if present, wish to say, shall value the property and cause the particulars thereof to be recorded in the manner set out in subrule (3).

RULE 20 [*Transfer to applicant*]

The rule provides for transfer of seized property to a creditor otherwise than at a valuation. The Commission recommends retention of subrule 1 but recommends replacing the word “Chairman” in line 3 with the word **“Chairperson”**

The Commission also recommends retention of subrule 2 and the proviso thereto but recommends insertion of the words **“ör rule 19 (4)”** between the closing bracket and the word **“have”** in line 1 of subrule (2).

The Commission recommends retention of subrule 3.

RULE 21 [*Notice of sale of property*]

The rule provides for the giving of notice of sale, the fixing of the time, date and venue of sale, the custody of the seized property pending sale, the publication of the list of properties to be offered for sale and where such publication is to be displayed.

The Commission found the rule to be in order and recommends its retention subject to the following amendments—

Subrule 3

(a) to delete the phrase beginning with the word **“shall”** in line 1 and ending with the word “seized” in line 3.

(b) To delete the phrase beginning with the word “The” in line 3 and ending with the word “notification” in line 4.

(c) To replace the words “Traditional Courts Officer” in line 8 with the word **“Chairperson”**.

As a result of these amendments, subrule 3 would read as follows—

(3) The Chairperson shall fix a place and date for such sale and such date shall not be less than ten days after the date of seizure unless the property is of a perishable nature and an earlier sale appears necessary in the interests of the judgment debtor in which case the Chairperson may fix a date for the sale of the property seized or the portions of it which are perishable on the first convenient day after seizure.

Subrule (4)

It was recommended to retain the subrule but to replace the words “Traditional Courts Officer” in line 1 with the word **“Court”**.

Subrule (5)

The Commission recommends deletion of the word “typed” in line 2. The Commission was of the view that it may not always be practical to have a typed copy of notice bearing in mind that resources may not be available in certain courts.

The Commission also recommends replacing the words “office of the District Commissioner for the District” in lines 4 and 5 and the words “Traditional Courts Officer” in line 6 with the word “**Court**” respectively.

RULE 22 [*Failure of applicant to take property*]

The rule provides for how the court may deal with a situation where the applicant fails to take custody of seized property and the debtor refuses to take the property back.

In subrule (1), it is provided that if the applicant does not remove the property, it shall be returned to the debtor at the place where the property was seized and the sale order shall lapse.

The Commission was of the view that such course of action would not serve the interests of justice. The Commission felt that in such a case the court should be able to proceed with the sale of the seized property either by private treaty or by public auction. The Commission therefore recommends that the subrule be recast to reflect this position.

In view of the proposed recasting subrule (1) the Commission recommends deletion of subrule (2).

Subrule (3) provides that proceeds of sale under subrule (2) (deleted) would be disposed of as the Chief Traditional Courts Commissioner might direct. The Commission noted that the power to dispose of such proceeds would lie with the court. The Commission also noted that there was need to provide for the manner in which the court would dispose of the proceeds. The Commission recommends that the proceeds of sale only, logically be used to—

- (i) pay the applicant
- (ii) pay off the costs of storage, if any; and
- (iii) pay any surplus to the judgment debtor.

The Commission therefore recommends that subrule (3) be recast to reflect the above position.

The Commission thus recommends that the amended rule 22 should read as follows—

**Failure of
applicant to
take property**

22.—(1) If the applicant shall fail to remove the seized property in accordance with rule 21 (2), the Court shall proceed to sell such property either by private treaty or by public auction.

(2) The Court shall dispose of the proceeds of the sale by paying—

- (a) the applicant the amount due under the sale order;**
- (b) for the costs of storage; and**
- (c) any surplus to the judgment debtor.**

RULE 23 [*Storage by Court*]

The rule allows the court to store any seized property at its premises. The Commission recommends retention of this rule.

RULE 24 [*Sale of property*]

The rule provides for the process of sale itself.

Subrule (1) and the proviso thereto provide for giving of notice by the court to the applicant who may have custody of property of the place, time and date of sale and requires the applicant to transport the property to the venue of sale. The Commission considered it not in the interests of justice to require the applicant to be responsible for transportation of the property for sale to the venue of sale. The Commission recommends that this must be the responsibility of the court itself. This would ensure that seized property was taken to place of sale.

The Commission therefore further recommends that subrule (1) should only deal with notification of the applicant of the time, date and place of sale by the court.

In view of the foregoing recommendation, the Commission conceded the need to make provision for the issue of transporting the seized property to the place of sale which is currently provided for in the proviso to subrule 1. The Commission thus recommends that a new subrule 2 should be introduced to address this aspect.

Subrule (2) provides that the sale shall be conducted by a Traditional Courts Officer with the assistance of a clerk of the court which made the sale order and such other officers. The Commission firstly noted that the appointment of who should conduct the sale would now need to be made by the Chairperson of the court which is to conduct the sale. The Commission recommends that the Chairperson should not conduct the sale and should only appoint officers of the court to do the work. The Commission therefore recommends that subrule (2) be recast to reflect this position and that it should be renumbered as subrule (3).

Subrule (4) provides that property of a perishable nature may be sold by private treaty. The Commission recommends retention of this subrule but also recommends replacing the words “Traditional Court Officer” in line 2 with the word “Court”.

Subrule (5) provides for the court to be able to exact a fee for its work in conducting a sale. The Commission recommends retention subject to simplifying the wording with regard to the determination of the fee payable.

The amended rule 24 is to read as follows—

**Sale of
Property** **24.—(1) The applicant having custody of the property seized and the court which made the sale order shall be notified by the Chairperson of the court which is to conduct the sale of the place and date fixed for the sale.**

(2) The court shall cause the property to be sold to be at the place of sale at the fixed time whether such property is in the custody of the court itself or the applicant.

(3) The sale shall be conducted by court officers as the Chairperson may assign who shall be assisted by the clerk of the court which issued the sale order.

(4) Except where the property is of a perishable nature, it shall be sold by public auction and the clerk of the court who attends the sale shall record the price paid for each item sold.

(5) Where the property is of a perishable nature it may be sold by private treaty if the court is satisfied that a fair price is obtained.

(6) Half of the amount of the fees payable to a bailiff under item 2 (a) in the First Schedule shall be payable to the Local Court in respect of every sale by a Local Court under this Rule.

RULE 25 [Report of sale]

The rule provides for the preparation of a report of the sale and contents thereof.

Subrule (1)

The Commission recommends the following amendments—

(i) to replace the words “Traditional Courts Officer” in lines 1 and 2 with the word “**Court**”;

(ii) to replace the words “Traditional Courts Officer” in line 4 with the word “**Chairperson**”.

Subrule (2)

The rule provides that property that remains unsold at the end of an auction may be sold by private treaty by the Traditional Court Officer. The Commission recommends replacing the words “Traditional Courts Officer” with the words “**officers as may be assigned**”. The Commission further recommends that the unsold property should be under the custody of the court and consequently recommends that the word “applicant” in line 4 be replaced by the word “**Court**”.

The Commission recommends retention of subrule (3). In rule 4, the Commission observed that proceeds should simply be paid to the applicant. Thus reference to the Chief Traditional courts Commissioner directing how such money should be accounted for should be deleted. The Commission recommends the subrule to read as follows—

(4) The proceeds of every sale after deducting the fee payable under rule 24 (5) shall be forthwith paid to the applicant who shall sign a receipt for the money.

In the proviso to subrule (4), the Commission recommends replacing the words “Traditional Courts Officer” in lines 3 and 4 with the word “Court”. The Commission also recommends replacing the words “Chief Traditional

Courts Commissioner” in line 5 with the word “**Registrar**”. The Commission was also of the view that the debtor need not have to apply for any surplus to be paid to him or her; it should be automatic that any surplus should be paid to the debtor.

Thus the Commission recommends that the phrase “on application by the debtor to the court which made the sale order” in line 5 be deleted.

RULE 26 [*Responsibilities of applicant*]

The rule provides for the responsibilities of an applicant in respect of seized property which he or she is supposed to take custody of.

The Commission recommends deletion of subrule (1) in view of the recommended amendment to rule 21 (2) which extinguishes an applicant’s responsibility to take custody of the seized property.

The Commission also recommends deletion of subrule (2) in view of the recommended amendment to Rule 24 (2) which now places the responsibility of transporting seized property to the sale venue on the court.

The Commission recommends retention of subrules (3), (4) and (5).

In subrule (6), the Commission recommends inserting the word “**missing**” between the words “is” and “reduced” in line 4. This was considered to be an obvious omission.

PART V
GENERAL

This part generally provides for offences, property exempt from seizure, objection to seizure, protection of persons obtaining property under a sale or transfer order, suspension of a sale order, period of validity of a sale or transfer order, prohibition of certain purchasers, service of notices under these rules and the powers of the Chief Traditional Courts Commissioner with regard to accounting procedures.

RULE 27 [*Offences*]

The rule provides that any person who rescues or attempts to rescue or in an unauthorized manner deals with seized property shall be liable to a fine of £20. The Commission noted that the subrule does not seem to clearly create an offence. The Commission therefore recommends insertion of the phrase “**guilty of an offence and shall be**” between the words “be” and “liable” appearing in line 3. The Commission further recommended revising the amount of fine to **K20,000.00** taking into account inflation.

In subrule (2) the Commission recommends deletion of the word “member” in line 1 as there would be no members in these courts as well as deletion of the phrase “Traditional” appearing in line 2. The Commission further observed that the subrule needs to clearly create the offence provided for therein and recommends insertion of the phrase “**guilty of an offence and shall be**” between the words “be” and “**liable**” in line 4. Finally the Commission recommends that the amount of fine be revised to **K50,000.00**.

In subrule 3, the Commission recommends deletion of the words “**Traditional**” and “**Magistrates**” appearing in line 1 and line 4 respectively.

The Commission observed that it would not be appropriate to have the offences under this rule and recommends that rule 27 be lifted to the man Act.

RULE 28 [*Exempt property*]

The rule provides for what type of property, subject to certain values, may not be seized. The Commission considered the current value of household effects, wearing apparel and tools of trade and felt that some reasonably meaningful values need to be set so that the debtor is not left virtually destitute. The Commission recommends retention of this rule but recommends revising the values stipulated in paragraphs (a) and (c) to **K20,000.00** and **K15,000.00** respectively.

RULE 29 [*Objection to seizure*]

The rule provides for the procedure on how an objection to seizure on the ground that the property does not belong to the debtor may be made and how the court should deal with the matter thereafter.

The Commission recommends retention of subrule 1. The Commission recommends retention of subrule 2 but recommends the following amendments—

In paragraph (b) to replace the words “Traditional Courts Officer” with the words “**Officers as may be assigned by the Chairperson**”.

In subrule 3, the Commission recommends that the words “Traditional Courts Officer” in line 1 of paragraph (a) be replaced with the words “**Officers as may be assigned by the Chairperson**”.

The Commission recommends retention of subrule (4) and subrule (5). In subrule (6), the Commission found it strange that there should be no right of appeal against a decision of a court on an objection. The Commission was of the view that the right of appeal must exist and recommends that subrule (6) be deleted.

RULE 30 [*Protection of persons obtaining property under a sale order or transfer order without notice of objection or where objection has failed*]

The rule seeks to ensure that a person who obtains property under a sale order or transfer order when there was no notice of objection or where such objection has in fact failed should acquire good title to such property. The Commission recommends retention of this rule but also recommends to delete the words “Traditional Courts Officer” appearing in lines 2 and 3.

RULE 31 [*Suspension of sale order; withdrawal and satisfaction*]

The rule provides for the suspension, withdrawal or satisfaction of a sale order or transfer order. The Commission recommends retention of subrules 1 and 2. In subrule 3, the Commission recommends replacing the words “Traditional Courts Officer” in line 3 with the words “**an officer of court as may be assigned by the Chairperson**” In subrule 4, the Commission recommends that payment by a debtor should in all cases be made to the Court.

In the proviso to subrule 4, the Commission recommends increasing the period within which a debtor may pay the amount due under a transfer order to recover his property to **10 days**. This was to achieve consistency with the requirement that property may only be transferred or sold not earlier than 10 days from the date of seizure.

RULE 32 [*Period of validity*]

The rule provides for the period within which a sale order and a transfer order shall remain valid. The Commission wondered why a transfer order should be renewable more than once as the rule suggests. The Commission was of the view that both a sale order and a transfer order should be renewable only once. The Commission therefore recommends that transfer order should be mentioned in subrule 2. The Commission recommends that the phrase “**or a transfer order**” be inserted between the words “order” and “may” in subrule 2.

RULE 33 [*Prohibition of certain purchasers*]

The rule provides that officers of Court, bailiffs, or people in the employ of bailiffs and Traditional Courts Officer may not purchase any property being sold by virtue of a sale order. The Commission considered whether this provision was to apply to all court officers, bailiffs and Traditional Courts Officers regardless of whether they were connected to the sale order or not. The Commission considered that such an interpretation would be too wide and recommends that the rule should only apply to those officers and bailiffs who are actually involved in the execution of the sale order. This would ensure that no mischief was perpetrated by such officers. The Commission recommends that the rule be recast to reflect this position and to read as follows—

Prohibition of certain purchasers	32. No officer of any Local Court or any bailiff involved or any person employed by a bailiff to assist in the execution of a sale order purchasers may himself or through any other person, purchase any property seized by virtue of such sale order.
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RULE 34 [*Service of Notice*]

The Rule provides the manner of service of notices. The Commission recommends retention of this rule.

RULE 35 [*Powers of Chief Traditional Courts Commissioner*]

The rule gives powers to the Chief Traditional Courts Commissioner to make orders and give directions as regards accounting. The Commission recommends that this power should now vest in the Chief Justice and accordingly recommends replacing the words “Chief Traditional Courts Commissioner” in line 1 with the words “**Chief Justice**”.

TRADITIONAL COURTS (APPEALS TO HIGH COURT) RULES

Under s. 67

These rules make provision for the procedure to be followed when lodging an appeal from Traditional Courts to the High Court. The rules fall under the Courts

Act so that they form part of the High Court system procedure rules. The Commission recommends that these Rules should be properly promulgated under the law regulating Local Courts and should therefore be incorporated under the proposed Local Courts (Appeals) Rules. The Commission reviewed the rules and made some observations and recommendations as below reflected.

PART I
APPEAL IN THE CRIMINAL CASES

RULE 2 [*Petition of appeal*]

This rule, which provides for petition of appeal in criminal matters, requires that the appeal must be commenced by way of petition to which petition a copy of the judgement appealed against should be attached and also provides for when and how such petition and notice of appeal may be made. The Commission observed that the rule requires the petition and notice of appeal to be made in writing in a specified Form. The Commission was of the view that appellants should be allowed to give oral notice of their intention to appeal to the court against whose judgement the appeal is to be made. The Commission however recommended that even where a notice of appeal is given orally, the grounds of appeal should be submitted in writing.

The Commission further considered the requirement for the appellant to attach a copy of the judgement to the petition of appeal not necessary but recommended that the appellant should cite the case number on his appeal documents. The Commission felt that the High Court would be better placed to obtain the whole record of the case from the relevant District Appeals Local Court.

The Commission also looked at Rules 3 and 9 of the Supreme Court Rules and sections 346, 349 and 350 of the Criminal Procedure and Evidence Code in its discussion of this rule. In consequence of these considerations, the Commission took the view that it would be better if Rule 2 was to be enlarged into three separate rules viz 2, 2A and 2B. The Commission therefore recommends the new rules to be as follows—

Appeal to High Court	2. Any person aggrieved by any final judgment or order, or any sentence made or passed by the District Appeals Local Court may appeal to the High Court.
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Limitation of appeals	2A. No appeal to the High Court shall be entertained from any finding sentence or order unless the appellant shall have given notice in writing to the High Court of his intention to appeal within 10 days of the date of finding sentence or order appealed against:
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Provided that if an appellant who is unrepresented orally states his intention to appeal in the court by which the finding sentence or order was made and at the time thereof, such oral statement shall be deemed to be a notice in writing to the High Court of his intention to appeal.

Petition of appeal **2B.—Every appeal shall be in duplicate in the form of a petition in writing presented by the appellant or his legal practitioner setting out his grounds of appeal.**

RULE 5 and RULE 6 [*Preparation of record*] [*Contents of record*]

Rule 5 provides for preparation of the record of case that has not been dismissed summarily by the High Court and Rule 6 provides for what should be the content of such a record. The Commission was of the view that the two rules could be combined into one rule. The Commission therefore recommended that a new rule be introduced with the marginal note reading “**Preparation and contents of record**”.

The Commission also considered whether it was necessary to require the District Appeals Local Court to prepare three copies of the record for transmission to the Registrar of the High Court instead of just sending the record. The Commission however felt that the requirement was in order as it would also ensure that there was always available a copy of the record should any copies go missing.

In the circumstances the Commission recommends the new rule to read as follows—

**Preparation
and contents
of records**

(1) If the High Court does not dismiss the appeal, it shall call upon the District Appeals Local Court to cause the record of the case to be prepared and to forward three copies thereof to the Registrar of the High Court.

(2) The record of appeal shall contain legible copies of the following items arranged in the following order—

(a) the record of proceedings in the Local Court of first instance as submitted to the District Appeals Local Court;

(b) the notes taken at the hearing of the appeal in the District Appeals Local Court;

(c) the judgment of the District Appeals Local Court.

RULE 8 [*Order of the High Court*]

The Commission recommends retention of this subject to necessary amendments to terminology so that the rule reads as follows—

**Order of the
High Court**

(1) When a case is decided on appeal by the High Court, it shall certify its judgement or order to the District Appeals Local Court from which the appeal was brought.

(2) The District Appeals Local Court to which the High Court certifies its judgement on order shall there upon make such orders as are conformable to the judgement or order of the High Court and, if necessary, the record shall be amended in accordance therewith.

PART II
APPEALS IN CIVIL CASES

RULE 9 [*Notice of appeal*]

The rule in subrule (1) provides that an appeal shall be brought by notice of appeal in Form I in the First Schedule. This obviously means that the notice of appeal has to be in writing and the Commission considered this position limiting and ill-suited for the anticipated Local Courts. The Commission thus recommends that oral notice should be allowed in these courts but that the appellant should still be required to complete Form 1 for purposes of grounds of appeal. Thus the Commission recommends introduction of a proviso to subrule I as follows—

Provided that where any party states his or her intention to appeal in the District Appeals Local Court by which such judgement was made and at the time thereof, such statement shall be noted on the record by the District Appeals Local Court and it shall be deemed to be a notice in writing to the High Court of his intention to appeal.

Subrules 2, 3 and 4 are to be retained without any amendments.

The Commission recommends the deletion of the word “**respectively**” appearing at the end of subrule (5) as it did not bear much significance. The Commission further recommends the deletion of the phrase “**if the appellant so requests**” appearing in the third line of the provision. The Commission was of the view that service of notice of appeal on parties directly affected by the appeal must be a matter of course and not on appellant’s request.

RULE 10 [*Cost of record*]

The rule provides for the payment by the appellant of a fixed sum of money as deposit towards the estimated cost of preparing the record and remission of same to the High Court. The Commission recommends that the words “Traditional Appeal Court” be duly replaced with the words “**District Appeals Local Court**”.

The Commission considered whether it would be appropriate that appellants in these courts should be required to pay the cost of preparing the record and transmission thereof to the High Court. This was in light of the perceived impecuniosity of the majority of court users in these courts. After some debate the Commission agreed that the cost of preparing the record should be shared between government and the appellant but that the cost of transmission of the record should be borne by Government. The Commission felt that payment of the cost of record preparation by the appellant would ensure that the record is actually produced whereas if it were to be free, it may lead to delays in such preparation. The Commission was aware that there would be meritorious cases of poor persons who would not afford to pay such costs and recommended that such persons should be exempted from paying part or the whole of the cost for preparation of the record. The Commission recommends that this should be achieved by introducing a proviso.

Cost of records

10. The appellant shall within such time as the District Appeals Local Court directs deposit a sum fixed to cover the estimated expense of making up the record of appeal.

Provided that the District Appeals Local Court may, if it thinks fit, dispense in the whole or in part with the payment of any sum chargeable under this rule on the basis that the appellant is not able to pay.

RULE 11 [*Security for costs*]

The rule makes provision for the court against whose judgement an appeal is made to require the appellant pay money or give security for the due prosecution of the appeal and for payment of any costs which the appellant may eventually be ordered to pay. The Commission found the rule to be rather oppressive and inconsistent with other provisions generally.

The Commission was also of the view that the issue of security for costs should be at the discretion of the District Appeals Local Court. The Commission thus recommends re-wording the rule to reflect the discretion conferred on the District Appeals Local Court regarding this matter.

RULE 12 [*Preparation of record*]

This rule deals with the preparation and contents of the record. The Commission noted that the marginal note did not aptly capture the substance of the rule and recommends it be amended to read “**Preparation and contents of record**”.

The Commission also recommends that subrule 1 be appropriately amended by replacing the words “Traditional Appeals Court” appearing in line 2 with the words “**District Appeals Local Court**”.

The Commission also observed that it may not always be possible to have typed copies as required under subrule (2). The Commission was of the view that in some cases photo stat copies may have to suffice so long they were legible. The Commission therefore recommends that the word “typed” appearing in line 1 of subrule (2) be deleted.

In paragraph (a) of subrule (2), the Commission recommends the substitution of the words “Traditional Court” appearing in line 1 with the words “**Local Court**” and the words “Traditional Appeal Court” appearing in line 2 with the words “**District Appeals Local Court**”.

In paragraph (b) of subrule (2) the Commission recommends replacing the words “Traditional Appeal Court” with the words “**District Appeals Local Court**”.

In paragraph (c) of subrule (2), the Commission recommends replacing the words “Traditional Appeal Court” with “**District Appeals Local Court**”. The Commission recommends replacing the words “Traditional Appeal Court” in line 2 of sub rule (3) with the words “**District Appeals Local Court**”.

The Commission observed that once served with notice that record of appeal is ready under subrule (3), the appellant is required under subrule (5), to prepare a memorandum of grounds of appeal within **14 days** of such service. The Commission felt that it might help the appellant if the notice served under subrule (3) were to be accompanied by the record of appeal so that he or she can ably formulate his or her grounds of appeal from such record. The Commission recommends that this change be made and it should be reflected by amendment of subrule (4) which should read as follows –

(4) The District Appeals Local Court shall supply the appellant with one copy of the record of appeal [together with the notice of appeal in Form 2 in the First Schedule].

In subrule (5) the Commission recommends that the words “Traditional Appeal Court” in line 4 be replaced with the words **“District Appeals Local Court”**.

RULE 13 [*Record of appeal*]

The rule deals with the transmission of the record of appeal to the High Court. The Commission observed that the marginal note does not aptly convey the substance of the rule and recommends that it be amended to read **“Transmission of record of appeal”**.

The Commission further recommends that the word **“forthwith”** be inserted between the words “shall” and “forward” appearing in line 2. The Commission felt that this would introduce urgency whilst retaining some discretion with regard to the time within which the court should transmit the record.

RULE 14 [*Submission by party not appealing*]

This rule provides for the situation where a party to an appeal decides not to appear at the hearing of the appeal. The Commission noted that the procedure was acceptable and recommends retention of the rule. The Commission however noted that the word “appealing” appearing in the marginal note contained an obvious typographical error and recommends its correction to read **“appearing”**.

RULE 15 [*Non-appearance of appellant*]

The rule provides for procedure to be followed where the appellant fails to appear at the hearing of his appeal and has not utilized the procedure under rule 14. Subrule (1) provides that where Rule 14 has not been utilized by the appellant and he or she has not appeared at the hearing, the High Court may strike out or dismiss his or her appeal with or without costs. The Commission recommends retention of the subrule. Subrule (2) provides that an appeal that has been struck out may be re-entered for hearing where the High Court thinks it fit and on such terms as to costs or otherwise as the High Court may determine. The Commission opined that the subrule did not clearly indicate that the matter may be re-entered only upon application by appellant. It appeared rather that the High Court could re-enter the dismissed appeal on its own motion. The Commission therefore considered it necessary for the avoidance of doubt, that the rule should provide that the High Court may reinstate an appeal only upon application by the appellant who should

show reasonable grounds as to why the appeal should be re-entered. The Commission was also of the view that there should be a time limit within which such application may be made. The Commission initially considered a period of 6 months as a reasonable limit but upon consideration of Rule 17, the Commission recommends that there should actually be two time limits. Firstly, an appellant should be able to apply for re-entry of a dismissed appeal without giving reasons within 30 days from date of such dismissal.

Secondly, where an appellant fails to apply for re-entry within 30 days, he or she should be able to do so but show reasonable grounds within ninety days of the expiry of 30 days in (i) above.

In the circumstances the Commission recommends that subrule (2) should be amended to introduce the requirement of appellant to make application for re-entry of a dismissed appeal and a new subrule (3) and a proviso thereto be introduced to provide for the limits as above explained.

The new subrules are to read as follows –

(2) Where an appeal has been struck out or dismissed owing to the non-appearance of the appellant, the High Court may upon application made by the appellant and on such terms as to costs or otherwise as it may deem just direct the appeal to be re-entered for hearing.

(3) An application to re-enter an appeal for hearing shall be made within thirty days from the date on which the appeal was struck out or dismissed.

Provided that an appellant who has failed within the period of thirty days to make an application under this rule may nevertheless at any time within a further period of ninety days thereafter, apply to the High Court to re-enter the appeal, and the High Court, on being satisfied that reasonable grounds have been shown for the application being made out of time may grant the application and make such order in relation thereto or as to costs as it may deem fit in the circumstances.

RULE 17 [*Application to set aside ex-parte judgment*]

The rule provides to the respondent opportunity to apply for setting aside an adverse ex-parte judgment delivered under rule 16.

The Commission considered subrule (1) to be in order and recommends its retention.

The Commission considered the period of twenty-one days under subrule (2) within which the respondent may make his application to be rather short. The Commission recommends extending this period to 30 days. In consequence, the Commission recommends amending the subrule by replacing the words “twenty-one” in line 2 with the word “**thirty**”.

The Commission further observed that in the proviso to subrule (2) a respondent may apply to have judgement set aside within 90 days after the expiry of the 30 day period but must show good and sufficient cause why application is made out of time.

The Commission was of the view that this may be best be achieved by a standard affidavit form and recommends the introduction of such form as Form 3 in the First Schedule.

The recommended form has been incorporated in the Draft Local Courts (Appeals) Rules.

RULE 18 [*Matters not expressly provided for*]

The rule provides that where there is no procedure laid down the court shall apply the practice and procedure obtaining in the Court of Appeal in England. The Commission was of the view that reliance on the practice of an English Court did not make sense when Malawi has its own superior courts, High Court and Supreme Court which could be relied upon to fill the gap. The Commission therefore considered the rule irrelevant and recommends deletion.

PART III—MISCELLANEOUS

RULE 19 [*Waiver of non-compliance*]

The rule gives the High Court power to waive non compliance with these rules in the prosecution of an appeal provided the non-compliance is not willful and the interests of justice demanded that it be waived. The Commission recommends retention of this rule.

LOCAL COURTS BILL**ARRANGEMENT OF SECTIONS****SECTION****PART I—PRELIMINARY**

1. Short title
2. Interpretation
3. Substantial justice to be done without undue regard to technicalities

PART II—ESTABLISHMENT AND CONSTITUTION OF LOCAL COURTS

4. Establishment of Local Courts
5. Composition of Local Courts.
6. Qualification of Chairperson
7. Assessors
8. Functions and duties of assessors
9. General Jurisdiction
10. Places and times of sittings of Local Courts
11. Laws to be administered
12. Court staff
13. Records to be kept
14. Seals

PART III—PRACTICE AND PROCEDURE

15. Practice and Procedure
16. Language of Court
17. General supervisory powers of District Appeals Local Courts

PART IV—CIVIL JURISDICTION

18. Civil jurisdiction of Local Courts
19. Awards in cases of a civil nature
20. Enforcement of awards
21. Offences relating to execution of sale orders and transfer orders

PART V—CRIMINAL JURISDICTION

22. Criminal jurisdiction of Local Courts
23. Orders in cases of a criminal nature
24. Power to release and caution by Local Courts
25. Promotion of reconciliation
26. Suspension of sentence
27. Sentences which a Local Court may pass
28. Committal of case to a magistrate court for sentencing
29. Compensation to injured or aggrieved person
30. Wilful refusal to pay compensation
31. Places of imprisonment

PART VI—GENERAL POWERS OF LOCAL COURT

32. Power to summon witnesses
33. Power to summon witnesses outside area of jurisdiction
34. Power to transfer case to another Local Court before inquiry or trial etc.
35. Powers to transfer case to a magistrate court and proceedings on transfer
36. Powers of remand in criminal cases
37. Execution of orders of High Court, subordinate Courts or other Local Courts

PART VII—MISCELLANEOUS

38. Contempt of court
39. Representation of parties
40. Appeals
41. Stay of execution and admission to bail pending appeal
42. Power on appeal
43. Indemnity of certain persons
44. Penalty for false evidence
45. Rules

A B I L L

entitled

An act to make provision for the establishment and constitution of Local Courts, the jurisdiction thereof, the procedure therein and for the proper administration of justice by such courts.

PART I—PRELIMINARY

- | | |
|----------------|---|
| Short title | 1. This Act may be cited as the Local Courts Act. |
| Interpretation | <p>2. In this Act, unless the context otherwise requires –</p> <p>“assessor” means a person appointed in accordance with section 7;</p> <p>“Chairperson” means a person appointed in accordance with section 5.</p> <p>“language of the court” means the languages or languages approved</p> <p style="padding-left: 20px;">by the Chief Justice, in writing, as the language or languages in which the proceedings may be held;</p> <p>“Local Court” means a court established under this Act and includes a District Appeals Local Court;</p> <p>“witness” includes a complainant and an accused who gives evidence.</p> |

3. No proceedings in a Local Court and no summons, warrant, process, order or decree issued or made thereby shall be varied or declared void upon appeal by reason of any defect in procedure or want of form and every court exercising appellate powers under this Act shall decide all matters according to substantial justice without undue regard to technicalities.

Substantial
justice to be
done without
undue regard
to
technicalities

PART II—ESTABLISHMENT AND CONSTITUTION OF LOCAL COURTS

4. There are hereby established the following Local Courts, subordinate to the High Court –

Establishment
of Local
Courts

(a) the District Appeals Local Courts which shall be appellate courts established in each district; and

(b) Local Courts established in such places in each district as the Chief Justice may determine.

5.—(1) A District Appeals Local Court or a Local Court shall be presided over by a Chairperson who shall be appointed by the Chief Justice on the recommendation of the Judicial Service Commission.

Composition
of Local
Courts

(2) The Chairperson may sit with at least two assessors selected from a panel of assessors appointed in accordance with section 7.

6. A person shall not qualify to be a Chairperson of a District Appeals Local Court or a Local Court unless that person –

Qualification
of Chairperson

(a) has attained the age of thirty-five years;

(b) is in possession of a Malawi School Certificate of Education or its equivalent;

(c) has adequate knowledge of the customary law of the area;

(d) has adequate command of the language of the Court;

(e) has English proficiency;

(f) has no criminal record involving dishonesty or moral turpitude; and

(g) is otherwise a fit and proper person.

7.—(1) In respect of every Local Court, the Registrar shall appoint a panel of assessors consisting of persons who are qualified to be assessors and such appointment shall be on recommendation from the District Resident Magistrate.

Assessors

(2) A person shall not qualify to be appointed as an assessor of a Local Court unless that person –

(a) has attained the age of fifty years;

(b) is able to read and write;

and duties

- (c) has adequate knowledge of customary law of the area;
- (d) has adequate command of the language of the Court;
- (e) has no criminal record involving dishonesty or moral turpitude;
- (f) is non partisan;
- (g) is otherwise a fit and proper person.

(3) The Registrar may, from time to time, in accordance with such directions as may be given by the Chief Justice, vary the composition of any panel of assessors appointed by him or her under this section.

Functions and
duties or
assessors

8.—(1) The functions and duties of assessors shall include the following—

- (a) advising the court in civil matters at customary law on any point or points; but such advice shall not be binding on the court;
- (b) monitoring seizure of property pursuant to a sale order or transfer order issued under this Act.

(2) An assessor shall attend the Court to which he or her is appointed on such days and for such periods as the Chairperson shall, from time to time, direct.

General
jurisdiction

9. Subject to this Act or any other written law for the time being in force, a Local Court shall have and may exercise jurisdiction within the area of its locality.

Places and times
of sittings of
Local Courts

10. The sittings of Local Courts shall ordinarily be held in such places as the Chief Justice may direct in the local jurisdiction of such courts, at such times as the Chairperson convining the court may deem most adapted to facilitate the business of the court.

Laws to be
administered

11. Subject to this Act, a Local Court shall administer —

- (a) the customary law prevailing in the jurisdiction of the Court so far as it is not inconsistent with the Constitution or any written law in force in Malawi;
- (b) the provisions of any Act which the Court is by or under such Act authorized to administer;

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(c) the provisions of all rules, orders, regulations or by-laws made under the Local Government Act and in force in the area of jurisdiction of the Court:

Provided that —

- (i) no criminal proceedings shall be taken and no criminal penalty imposed otherwise than in respect of an offence constituted under an Act or under any rule, regulation, order or by-law made thereunder; and

(ii) due regard shall be given to the provisions of the Constitution in applying any customary or statutory law.

12.—(1) The Chief Justice may appoint or authorize the appointment of suitable persons as court clerks and other officers of any Local Court Court Staff

(2) Subject to the Judicature Administration Act and any rules made thereunder, the Chief Justice may terminate or authorize the termination of any appointment made under this section. Cap. 3:10 ...

13. Local Courts shall keep written records and furnish returns of cases tried by them to the District Appeals Local Court in such manner as the Chief Justice may from time to time direct. Records to be kept

14. Local Courts shall use seals of such nature and patterns as the Chief Justice may direct. Seals

PART III—PRACTICE AND PROCEDURE

15. The practice and procedure of Local Courts shall be in accordance with procedure this Act and any rules made there under: Practice and procedure

Provided that if this Act or any rules made thereunder does not make provision for any particular point of practice and procedure then the practice and procedure of Local Courts shall be—

(a) in relation to criminal matters, in accordance with the Criminal Procedure and Evidence Code; and

(b) in relation to civil matters, as nearly as may be in accordance with the practice for the time being observed by magistrate courts.

16.—(1) In any civil or criminal proceedings, a Local Court shall use the language of the Court as may be approved by the Chief Justice. Language of Court

(2) Notwithstanding subsection (1), the Chairperson of the Local Court shall personally record the proceedings in the English language and shall record the evidence of the witnesses in the form of a narrative:

Provided that the Chairperson may, in his discretion, take down any particular question and answer.

17.—(1) A District Appeals Local Court shall have general supervisory and supervisory revisionary jurisdiction over all Local Courts within its jurisdiction and may, Appeals in District particular, but without prejudice to the generality of the foregoing provision, if it appears desirable in the interests of justice, either of its own motion or at the instance of any party or person interested at any stage in any matter or proceeding, whether civil or criminal, call for the record thereof and may remove the same into the District Appeals Local Court or may give such local Court such directions as to the further conduct of the same as justice may require. General Supervisory powers of Appeal Local Courts

(2) Upon the District Appeals Local Court calling for any record under subsection (1), the matter or proceeding in question shall be stayed in the Local Court pending the further order of the District Appeals Local Court.

PART IV—CIVIL JURISDICTION

Civil
jurisdiction of
Local Courts

18.—(1) Subject to this Act or any other written law, Local Courts shall have and may exercise jurisdiction over civil cases at customary law.

(2) Notwithstanding subsection (1), no Local Court shall have jurisdiction to deal with, try or determine any civil case at customary law—

(a) whenever the title or ownership of customary land is in question;

(b) relating to inheritance of deceased property;

(c) wherein the guardianship or custody of infants is in question;

Cap. 7:02

(d) relating to issues of witchcraft under the Witchcraft Act; and

(e) any other matter deemed to be

Awards in cases
of a civil nature

19.—(1) A Local Court may, in cases of a civil nature –

(a) award compensation which may include an amount for costs and expenses incurred by a successful party or his witnesses;

(b) order the restitution of any property;

(c) order the specific performance of any contract at customary law; or

(d) make any other order which the justice of the case may require.

(2) An award of compensation or other order under subsection (1) may provide for –

(a) payment in money or in kind;

(b) the time or times for making payment or doing any other act;

(c) payment by instalments; or

(d) any other manner of compliance therewith as the Court may think just.

Enforcement of
awards

20. In case of any default in the performance of or compliance with an award or other order in accordance with the terms thereof, the Court may order –

(a) that any property, referred to in an order for restitution or an order for specific performance of a contract or other order for delivery or transfer of property, may be seized and transferred to the person entitled to receive it;

(b) that payment of any sum of money due be enforced by the seizure of any property belonging to the person ordered to make the payment and—

(i) by the sale thereof; or

(ii) the transfer thereof to the person entitled to receive the payment at a value fixed by the Court;

(c) that the payment of compensation in kind be enforced by the seizure of property of that kind belonging to the person ordered to pay the compensation and the transfer thereof to the person entitled to receive the compensation.

21.—(1) Any person who rescues, attempts to rescue or in any to execution of sale orders or unauthorized manner deals with any goods seized in the execution of transfer orders a sale order or transfer order shall be guilty of an offence and shall be liable to a fine of K20,000.

Offences relating to the execution of sale orders o transfer orders

(2) Any person who willfully obstructs or resists any assessor, officer of court or a bailiff or any person assisting him with the execution of a sale order or transfer order issued under this Act shall be guilty of an offence and shall be liable to a fine of K50,000 and imprisonment for 3 months.

(3) A bailiff or an officer of a court may arrest with or without warrant a person who commits or attempts to commit an offence under this section and shall bring the person arrested before any Local Court without delay.

PART V—CRIMINAL JURISDICTION

22. Subject to this Act or any other written law, a Local Court shall have and may exercise criminal jurisdiction in such minor offences under the Penal Code and in any other written law as prescribed in the First Schedule.

Criminal jurisdiction of Local Courts First Schedule

23.—(1) Subject to this Act or any other written law, a Local Court may in cases of a criminal nature pass any of the following sentences authorized by law —

Orders in cases of a criminal nature

(a) community service;

(b) fine not exceeding K5,000;

(c) payment of compensation;

(d) finding security to keep the peace and be of good behaviour

(e) forfeiture, where it is provided for by an Act of Parliament;

(f) imprisonment:

Provided that no sentence of imprisonment shall be imposed except in cases with aggravated circumstances or for repeat offenders and such sentence shall not exceed a maximum period of twelve months.

(2) A Local Court may pass any sentence combining any of the sentences specified in (a) to (c).

(3) A Local Court may impose a fine only where it is probable that the accused can afford to pay the fine and in such case the court may order that any fine which it shall impose shall be paid at such time or times or by such instalments or in kind or otherwise as it shall think just.

(4) Where a Local Court makes an order for the payment of a fine, it shall have the power to direct by its sentence that in default of the payment of the fine the order should convert to community service as will satisfy the justice of the case.

(5) The order of community service imposed by a Local Court in default of payment of a fine shall terminate whenever the fine is paid.

(6) Where an order of community service is imposed by a Local Court in default of payment of a fine, that term shall, on the payment of a part of such sum, be proportionately reduced.

(7) When a person is convicted of any offence, a Local Court may, instead of passing sentence under subsection (1), order such person to enter into a bond, with or without sureties in such amount as the court thinks fit, that he shall keep the peace and be of good behaviour for a time to be fixed by the court, and sections 123, 125 and 341 of the Criminal Procedure and Evidence Code shall apply mutatis mutandis to any bond entered into under this section.

Cap. 8:01

Power to release
and caution by
Local Court

24. Notwithstanding section 23, where in any trial a Local Court thinks that the charge is proved but is of the opinion that, having regard to the character, antecedents, age, health or mental condition of the accused, or to the trivial nature of the offence, or to the extenuating circumstances in which the offence was committed, it is inexpedient to inflict any punishment, the court may, without proceeding to conviction, make an order dismissing the charge, after such admonition or caution to the offender as the court sees fit.

Promotion of
reconciliation

25. In case of common assault or any offence of a private nature not amounting to a felony, a Local Court may promote reconciliation and encourage an amicable settlement of the matter on payment of compensation or other terms approved by the Court and may thereupon order proceedings to be stayed or terminated.

Suspension
Sentence of

26.—(1) Where a person is convicted before any Local Court for an offence, the Court may pass a sentence of imprisonment, but, in its discretion order the operation of the whole or any part of the

sentence to be suspended for a period not exceeding two years on such conditions, relating to compensation to be made by the offender for damage or pecuniary loss, or to good conduct, or to any other matter whatsoever, as the Court may specify in the order.

(2) If the conditions of any order made under subsection (1) are not fulfilled, the offender may upon the order of the trial court be arrested without warrant and brought before the said court to be committed to undergo the sentence of imprisonment originally imposed:

Provided that the said court may in its discretion grant an order further suspending the operation of the sentence subject to such conditions as might have been imposed at the time of the passing of the sentence.

27.—(1) The aggregate of any terms of consecutive sentences of Court may pass imprisonment which a Local Court may impose on an offender shall not exceed two years.

Sentences
which a Local
Court may
pass

(2) Where in a trial by a Local Court a person is convicted of an offence and if the court is of the opinion that greater punishment should be inflicted for the offence than it has power to inflict, the court may, for reasons to be recorded in writing on the record of the case, instead of dealing with him in any other manner, commit him to an appropriate magistrate court for sentence.

(3) Any person committed to a magistrate court for sentence under this rule shall be brought before the court to which he has been committed at the first convenient opportunity.

(4) When a person is brought before a magistrate court for sentencing in accordance with subrule (3), the magistrate court shall inquire into the circumstances of the case and shall thereafter proceed as if such person had pleaded guilty before it of the offence in respect of which he has been committed.

28.—(1) Where in a trial by a Local Court a person is convicted of an magistrate court offence, if the court is of the opinion that greater punishment should be inflicted for the offence than it has power to inflict, the court may, for reasons to be recorded in writing on the record of the case, instead of dealing with him or her in any other manner, commit him or her to an appropriate magistrate court for sentencing.

Crimmittal of
case to a
magistrate
court for
sentencing

(2) Any person committed to a magistrate court for sentence under this section shall be brought before the court to which he or she has been committed at the first convenient opportunity.

(3) When a person is brought before a magistrate court for sentencing in accordance with subsection (1), the magistrate court shall inquire into the circumstances of the case and shall thereafter proceed as if such person had pleaded guilty before it of the offence in respect of which he or she has been committed.

Compensation
to injured or
aggrieved
person

29.—(1) A Local Court may, where it convicts any person, adjudge that such person pay reasonable compensation to, or to any member of the family of, any person injured by the act or omission in respect of which such conviction was made in addition to any other punishment which the court may impose.

(2) Any compensation awarded by a Local Court under this section may be ordered to be paid at such time or times or by such instalments as it shall think just.

(3) Where a convicted person defaults in the payment of any compensation or any instalments of the same when due, the court may order that the amount of the compensation or the instalment, as the case may be, shall be levied by the sale of any property belonging to the convicted person.

Wilful refusal
to pay
compensation

30. Any person subject to the jurisdiction of a Local Court who without lawful excuse and having the means to pay any compensation awarded against him refuses or willfully fails to make such payment after due notice shall be guilty of an offence liable to a fine of ... and to imprisonment for six months.

Places of
imprisonment
Cap. 9:02

31. Every person sentenced by a Local Court to imprisonment or taken imprisonment in the execution of the process of such Court shall be detained in a place authorized under the Prisons Act as a prison for the purposes of that Act.

Part VI—GENERAL POWERS OF LOCAL COURT

Power to
summon
witness

32.—(1) Every Local Court shall have power to summon before the court summon any person within the jurisdiction of the court for the purpose of giving evidence.

(2) Any person who without reasonable excuse shall fail to obey summons lawfully issued under this section may be arrested and brought before the court and shall be liable to a fine of K5,000 and to imprisonment for three months.

Power to
summon
witness outside
area of
jurisdiction

33. Every Local Court shall have power to summon any person outside the area of jurisdiction of such court when the appearance person shall be required as a witness in any proceedings within the jurisdiction of such court.

Transfer of case
to another Local
Court.

34.—(1) Where a person appears before a Local Court, the Local Court—

(a) shall, if satisfied that it has no jurisdiction to try or inquire into the case; or

(b) may, if it is of the opinion that the case should be tried by or inquired into by another Local Court direct that the case be adjourned and transferred to any Local Court which is competent to try or inquire into the case.

35.—(1) A Local Court shall have power to transfer a case to a magistrate court for trial or retrial.

Power to transfer case to a magistrate court and proceedings on after

(2) Where a case is transferred to a magistrate court pursuant to subsection (1), the Local Court shall send a report the proceedings to the magistrate court, and thereupon the magistrate court shall proceed to the trial or retrial of the case as though —

(a) in a criminal proceeding, a charge outlining the acts constituting the offence had been presented to the court;

(b) in a civil proceeding, a complaint had been filed in the court.

36.—(1) Where a person is arrested for any criminal offence and taken into remand in custody, whether with or without warrant, within the local limits of jurisdiction of a Local Court, then, notwithstanding that the charge is not one which is within the competence of the Local Court concerned to hear and determine, such person may be brought before the Local Court concerned for remand.

Power of remand in criminal cases

(2) Upon any person being brought before a Local Court under subsection (1), the Local Court may order that the person concerned —

(a) be remanded in custody and brought before a court of competent jurisdiction as soon as possible or on such date not exceeding forty eight hours;

(b) be admitted to bail, subject to his appearance before a court of competent jurisdiction at such place and time as may be specified in such order.

(3) A Local Court making any order under subsection (2) shall forthwith send a copy of such order to the court before which the accused person is required thereunder to be brought or to appear.

37.—(1) A Local Court shall carry into execution any decrees or orders of High the High Court or of any subordinate court or of any other Local Court subordinate directed to such Local Court, and shall execute all warrants, and serve all process issued by any such other courts and directed to the Local Court for execution or service and shall generally give such assistance to any such courts as may be required.

Execution of high Court subordinate Court or other Local Court

(2) Upon receipt of any decree, order, warrant or process under subsection (1), the Local Court shall enter such decree, order, warrant or process in its own records and enforce, execute or serve them as though they were issued originally by that Local Court.

PART VII—MISCELLANEOUS

Contempt of
court

38.—(1) Any person subject to the jurisdiction of a Local Court who, without lawful excuse—

(a) omits to produce or deliver up any document or thing on the order of such court and the court is satisfied that such person was able to deliver up such document or thing;

(b) intentionally insults the court; or

(c) intentionally interrupts the proceedings of the court, shall be guilty of contempt of court and shall be liable to a fine of K20,000 and to imprisonment for six months.

(3) Where any person is charged with contempt of court in the circumstances under subsection (1), the Local Court shall issue a summons in Form I in the Second Schedule.

Second
Schedule

Representation
of parties

39.—(1) Legal practitioners may appear or act for any party in any criminal of parties matter before a Local Court.

(2) In any civil matter, a Local Court may permit the husband or wife or guardian or any servant or master of any plaintiff or defendant who shall give satisfactory proof that he or she has authority in that behalf to appear to act for such plaintiff or defendant.

Appeals

40.—(1) Any person aggrieved by any judgement in any proceedings, civil or criminal, before a Local Court may within thirty days of the delivery of such judgement appeal to a District Appeals Local Court.

(2) Any person aggrieved by any judgement of a District Appeals Local Court may, within thirty days of the delivery of such judgement, appeal to the High Court.

(3) Leave to appeal out of time under this section may be given by the court having power to hear the appeal.

Stay of
execution and
admission onto
bail pending
appeal

41.—(1) Notice of intention to appeal in a criminal case shall not operate as a stay of execution of any sentence or order, but the court of first instance which passed the sentence or made the order or the District Appeals Local Court or High Court, as the case may be, may order that any such sentence or order be stayed pending the hearing of an appeal and, if the appellant is in custody, that he may be released on bail with or without sureties, pending such hearing.

(2) If the appeal is ultimately dismissed and an original sentence of imprisonment confirmed, or some other sentence of imprisonment substituted therefore, the time during which the appellant has been released on bail shall be excluded in computing the term of imprisonment to which he is finally sentenced.

42. A District Appeals Local Court in the exercise of its appellate jurisdiction in any cause or matter under this Act may— Power on appeal

(a) make any such order or pass any such sentence as the court of first instance could have made or passed in such cause or matter; and

(b) order any such cause or matter to be retried before the court of first instance or before any other Local Court.

43.—(1) No person shall be liable to be sued in any court for any act done certain persons or ordered to be done by him or her in the exercise of jurisdiction conferred by this Act, whether or not within the limits of such jurisdiction, if at the time of such act or order he or she believed in good faith that he or she had jurisdiction to do such act or make such order. Idemnity of certain perons

(2) No officer of any Local Court or other person bound to execute lawful warrants or orders issued or made in the exercise of jurisdiction conferred by this Act shall be liable to be sued in any court for the execution of any warrant or order which he or she would be bound to execute, if the person issuing the same had been acting in the exercise of lawful authority.

44. Any person who gives evidence in any proceedings before a Local false Court, whether upon oath or otherwise, which he or she knows to be false, or believes to be false, or does not believe to be true, shall be guilty of an offence and shall be liable to a fine of K5,000 and to imprisonment for twelve months. Penalty for false evidence

45. (1) The Chief Justice may make rules for carrying this Act into effect. Rules

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for —

(a) the practice and procedure of Local Courts in their original and appellate jurisdiction;

(b) the procedure relating to the institution of criminal and civil proceedings;

(c) the practice relating to the arrest of accused persons;

(d) the practice relating to the remand of accused persons;

(e) the provisions relating to execution and attachment in cases of a criminal and civil nature;

(f) the fees to be charged in Local Courts;

(g) the disposal and application of fines and fees received in Local Courts;

(*h*) the empowering and requiring of Local Courts to enforce decrees, serve summonses and execute warrants made or issued by other Local Courts;

(*i*) the costs to be allowed in cases of a criminal or civil nature;

(*j*) the procedure regulating the institution of appeals;

(*k*) the records to be kept by Local Courts;

(*l*) the forms to be used;

(*m*) the terms and conditions of service of Chairpersons, officers and staff of Local Courts, and the remuneration to be paid to assessors.

FIRST SCHEDULE

JURISDICTION OF GRADE A AND GRADE B LOCAL COURTS

Penal Code Cap. 7:01

SECTION 47	—	Offences in relation to publications, importation of which is prohibited. (whole).
subsection (2) only		
SECTION 60	—	Publication of false news likely to cause fear and alarm to the public.
SECTION 81	—	Prohibition of carrying offensive weapons without lawful authority or reasonable excuse.
SECTION 84	—	Fighting in public
SECTION 85	—	Challenging to fight a duel.
SECTION 88	—	Subsections 1 (a) and 1 (b) only.
SECTION 107	—	Deceiving witnesses
SECTION 108	—	Destroying evidence
SECTION 113	—	Offences relating to judicial proceedings
SECTION 115	—	Escape
SECTION 116	—	Permitting prisoners to escape
SECTION 118	—	Removal, etc., of property under lawful seizure
SECTION 123	—	Disobedience of statutory duty
SECTION 128	—	Disturbing religious assemblies
SECTION 129	—	Trespassing on burial places
SECTION 130	—	Writing or uttering words with intent to wound religious feelings
SECTION 131	—	Hindering burial of dead body, etc
SECTION 137	—	(Subsection (3) only) Insulting the modesty of a woman
(3)		
SECTION 166	—	Master not providing for servants or apprentices
SECTION 168	—	Common nuisance
SECTION 180	—	Idle and disorderly persons
SECTION 181	—	Conduct likely to cause a breach of the peace
SECTION 182	—	Use of insulting language.
SECTION 183	—	Nuisances by drunken persons, etc.

SECTION 184	—	Rogues and vagabonds.
SECTION 197	—	Fouling water.
SECTION 198	—	Fouling air
SECTION 199	—	Offensive trades.
SECTION 248	—	Dealing in poisonous substances in negligent manner.
SECTION 249	—	Endangering safety of persons traveling by railway.
SECTION 252	—	Danger or obstruction in public way or line of navigation.
SECTION 253	—	Common assault.
SECTION 278	—	General punishment for theft.
		(As read with sections 270 to 277 inclusive.)
		Provided that the value of the thing stolen does not exceed K10,000.00.
Section 299	—	Unlawful use of vehicles, animals, etc.
SECTION 314	—	Criminal trespass.
SECTION 316	—	Unauthorised user of land and premises.
SECTION 321	—	Cheating
		Provided that the value of the thing obtained does not exceed K10,000.00.
SECTION 325	—	Pretending to tell fortunes.
SECTION 326	—	Obtaining registration, etc., by false pretence.
SECTION 327	—	False declaration for passport.
SECTION 328	—	Receiving property unlawfully obtained.
		(Subsection (2) only as read with subsection (3)).
		Provided that the value of the thing received does not exceed K10,000.00.
SECTION 329	—	Person having in possession property suspected of being stolen
SECTION 337	—	Arson, paragraphs (a), (b) and (c). Provided that the value of the subject matter does not exceed K10,000.00.
SECTION 339	—	Setting fire to crops. Provided that the value of such crops shall not exceed K10,000.00.
SECTION 344 (1)	—	Malicious damage (Subsection (1) only). Provided that the value of the subject matter does not exceed K10,000.00.
SECTION 389	—	Personation in general.
SECTION 401	—	Attempts, provided that a person may only be tried for an attempt to commit an offence which the court has jurisdiction to hear.

CRIMINAL PROCEDURE AND EVIDENCE CODE

Community Service Regulations

POLICE ACT (CAP. 13:01)

SECTION 26 conditions	—	Penalty for disobeying order or violating of a permit issued under section 25.
SECTION 27	—	Unlawful assemblies.
SECTION 28	—	Penalty for any violation of an order prohibiting meetings and processions.

LOCAL GOVERNMENT ACT

All by-laws made under the Act and in force within the area of the Court's jurisdiction.

PUBLIC HEALTH ACT (CAP. 34:01)

Parts III, IV and V only.

BUSINESS LICENSING ACT (CAP. 46:01)

The whole

HIDE AND SKIN TRADE ACT (CAP. 50:02)

The whole

All rules made thereunder

LIQUOR ACT

The whole

All rules made thereunder.

EMPLOYMENT ACT

SECTION 4	—	Prohibition against forced labour
SECTION 21	—	Prohibition against child labour
SECTION 22	—	Harzadous work
SECTION 24		
SECTION 44		
SECTION 52	—	Prohibition relating to payment of remuneration
SECTION 66	—	Offences and penalties

FORESTRY ACT (CAP. 63:01)

The whole excepting section 68, 70, 71, 73.

PLANT PROTECTION ACT (CAP. 64:01)

SECTION 11 (*d*) excepting paragraph (1) (*d*)

NOXIOUS WEED ACT (CAP.64:02)

The whole

TOBACCO ACT (CAP. 65:02)

The whole

All rules made thereunder.

PROTECTION OF ANIMAL ACT (CAP. 66:01)

The whole

CONTROL AND DISEASE OF ANIMAL ACT (CAP. 66:02)

The whole

All regulations made thereunder

FISHERIES CONSERVATION AND MANAGEMENT ACT (CAP. 66:05)

The whole

All rules made thereunder.

CROCODILES ACT (CAP. 66:06)

The whole

ROAD TRAFFIC ACT (CAP. 69:01)

All rules and regulations made thereunder.

SECOND SCHEDULE

section 37

FORM 1

MALAWI

In the Local Court

Criminal Case No. of 20

Republic

.....

versus

(1)

CRIMINAL SUMMONS FOR CONTEMPT OF COURT

Sec. 27

To: (2)

of (3)

You are ordered to come to the Court at (4)

..... on (5) day of

day of 20 at o'clock in

the *fore noon to answer a charge that you without lawful

after

excuse –

*omitted to produce or deliver up (6)to

(7) on the order of this Court made on the

(8) day of 20

*having the means to pay compensation awarded against you by this Court on the

(8) day of 20

have refused or neglected to pay such compensation

and that you thereby committed an offence under section 20 of the Local Courts Act.

If you fail to come to Court you will be liable to arrest.

Seal

Date Chairperson

*Delete whichever is not applicable.

NOTE:—See below for instructions on how to complete the form.

-
- (¹) Insert name of accused.
 - (²) Insert address of accused.
 - (³) Insert place.
 - (⁴) Insert day, date and time of hearing.
 - (⁵) Insert document or thing not produced.
 - (⁶) Insert name of Court or person to whom document or thing was to be produced or name of person to whom compensation payable.
 - (⁷) Insert date of order of award.
-

LOCAL COURTS (APPEALS) RULES

ARRANGEMENT OF RULES

RULE

PART I—PRELIMINARY

1. Citation
2. Interpretation
3. Where no procedure laid down

PART II—APPEALS IN THE CIVIL CASES

DIVISION I – Appeals to the District Appeals Local Courts

4. Notice of appeal
5. Extension of time in criminal appeals
6. Record of proceedings in criminal matters
7. Appellant in prison
8. Hearing of appeal
9. Attendance at hearing
10. Further Evidence
11. Decision by District Appeals Local Courts

DIVISION II – Appeals to the High Court

12. Appeals to High Court
13. Limitation of appeals
14. Petition of appeal
15. Appellant in prison
16. Summary dismissal of appeal
17. Preparation and contents of record
18. Notice of time and place of hearing
19. Order of the High Court

PART III—APPEALS IN THE CIVIL CASES

DIVISION I – Appeals to the District Appeals Local Courts

20. Notice of appeal
21. Extension of time in civil appeal
22. Record of proceedings in civil appeals
23. Hearing of appeal
24. Attendance at hearing
25. Submission by party not appearing
26. Non-appearance of appellant
27. Non-appearance of respondent
28. Application to set aside ex-parte judgement
29. Evidence
30. Costs

DIVISION II – Appeals to the High Court

31. Notice of appeal
32. Cost of record
33. Security for costs
34. Preparation and contents of record
35. Transmission of record of appeal
36. Submission by party not appearing
37. Non-appearance by appellant
38. Non-appearance of respondent

PART IV—MISCELLANEOUS

39. Waiver of non-compliance
40. Stay of execution and admission to bail pending appeal

LOCAL COURTS (APPEALS) RULES

Under s. 45

PART I—PRELIMINARY

- | | |
|------------------------------|--|
| Citation | 1. These Rules may be cited as the Local Courts (Appeals) Rules. |
| Interpretation | <p>2. In these Rules, unless the context otherwise requires—</p> <p>“appeal court” means a District Appeals Local Court, the High Court and the Supreme Court of Appeal;</p> <p>“civil appeal” means an appeal in a civil cause or matter;</p> <p>“court of first instance” means a Local Court established as such under section 4 of the Act;</p> <p>“criminal appeal” means an appeal in a criminal cause or matter.</p> |
| Where no procedure laid down | <p>3. In any matter of practice or procedure not specifically provided for in procedure laid these Rules, an appeal court may,—</p> <p>(a) apply any appropriate provision applicable in a magistrate court;</p> <p>(b) in the case of the High Court, apply any appropriate provision as provided in the Supreme Court of Appeal Act or the Courts Act.</p> |

PART II—APPEALS IN CRIMINAL CASES

DIVISION I – Appeals to the District Appeals Local Courts

- | | |
|------------------|---|
| Notice of appeal | <p>4.—(1) Any person aggrieved by any order or decision of a court of first appeal instance in a criminal cause or matter may appeal to an appeal court by giving notice of appeal, and, subject to subrule (3), by depositing with the court of first instance the amount of any fine and other sums which he is liable to pay under the order or decision appealed from.</p> |
|------------------|---|

(2) Every notice of appeal shall be in writing and be lodged with the court which made the order or decision against which it is desired to appeal within thirty days:

Provided that an illiterate person or a person who is sick may give oral notice to the clerk of such court who shall record such notice in writing.

(3) If the appellant satisfies the court of first instance that he is without sufficient means, such court may accept a notice of appeal without payment in full of the amount of fine or compensation, on payment of such deposit, if any, as the court may in its discretion think proper:

Provided that an appeal court may, on application, alter or vary any order or direction made under this subrule.

5.—(1) Application for leave to appeal out of time under section 29 of the time in criminal Act shall be made to the court of first instance from whose order or decision it is desired to appeal. Extension of time in criminal appeals

(2) The court of first instance shall forward the application to the District Appeals Local Court with a note of the relevant facts.

(3) The District Appeals Local Court shall, if it considers that such leave should be given, fix a date on or before which notice of appeal shall be given and the fee, if any, for appeal shall be paid to the court of first instance.

6.—(1) This rule shall apply to criminal appeals in which the appellant has proceedings duly given notice of appeal. Record of proceedings in criminal matters

(2) On receipt of the notice of appeal, the clerk of the court of first instance shall forthwith forward the appeal to the District Appeals Local Court having jurisdiction in the matter and shall prepare a record of proceedings consisting of a copy of—

- (a) the summons or charge and plea;
- (b) the notes of evidence taken in the case and all documentary evidence;
- (c) the order or judgment;
- (d) the sentence;
- (e) the notice and grounds of appeal,

and shall with all reasonable speed forward the record of proceedings and any exhibits received in evidence in the case to the District Appeals Local Court and, on request and payment of the prescribed fee, shall supply a copy of the record of proceedings to the appellant.

7.—(1) If the appellant is in prison he or she may present his or her notice in prison of appeal to the Officer-in-Charge of the prison in which he or she is held and the Officer-in-Charge shall thereupon forward the notice to the District Appeals Local Court having jurisdiction. Appellant in prison

(2) For the purposes of this rule, the term “Officer-in-Charge” has the meaning ascribed to it by section 9 of the Prisons Act.

Hearing of
appeal

8.—(1) On receipt of the record of proceedings, a District Appeals Local appeal Court shall fix the time and date for the hearing of the appeal and the clerk of such court shall notify the appellant and the prosecutor of the time and place so fixed.

(2) The notice of hearing under subrule (1) shall be given not less than seven clear days before the date fixed for hearing.

Attendance at
hearing

9. All parties to an appeal shall be entitled to be present at the hearing.

Further
Evidence

10.—(1) A District Appeals Local Court may in any case in which it may consider it necessary or expedient in the interest of justice so to do, admit fresh evidence on the hearing of an appeal:

Provided that where the fresh evidence admitted introduces a new matter which the prosecution could not by the exercise of reasonable diligence have foreseen the court may allow the prosecution to adduce evidence in reply to rebut the said matter.

(2) Evidence taken in pursuance of this rule shall be taken as if it were evidence taken at trial before a Local Court.

Decision by
District Appeals
Local Courts

11.—(1) Where a criminal appeal is decided by a District Appeals Local District Court, it shall certify its judgement or order to the court of first instance accordingly.

(2) If a sentence imposed by the court of first instance is set aside by the District Appeals Local Court, either with or without a new sentence being imposed, the District Appeals Local Court shall cause a warrant in the Form set out in the First Schedule to be drawn up.

DIVISION II – Appeals to the High Court

Appeals to High
Court

12. Any person aggrieved by any final judgement, order or sentence made High Court or passed by the District Appeals Local Court may appeal to the High Court.

Limitation of
appeals

13. No appeal to the High Court shall be entertained from any judgement of appeals order or sentence unless the appellant shall have given notice in writing to the High Court of his intention to appeal within ten days of the date of the judgement, order or sentence appealed against:

Provided that if an appellant who is unrepresented orally states his intention to appeal in the District Appeals Local Court at the time thereof, such notice shall be deemed to be a notice in writing to the High Court of his intention to appeal.

14.—(1) Every appeal shall be in the Form of a petition in writing presented by the appellant or his legal practitioner. Petition of appeal

(2) Where the appellant is represented by a legal practitioner, the petition shall contain particulars of matters of law or of fact in regard to which the District Appeals Local Court appealed from is alleged to have erred.

15. If the appellant is in prison he may present his petition of appeal and the copies accompanying the same to the Officer-in-charge of the prison who shall thereupon forward such petitions and copy of the judgement or order to the Registrar of the High Court. Appellant in prison

16.—(1) On receiving the petition and copy under rule 14, the High Court shall peruse the same, and if it considers that there is no sufficient ground for interfering, it may dismiss the appeal summarily: Summary dismissal of appeal

Provided that –

(a) no appeal shall be dismissed unless the appellant (if not in custody) or his legal practitioner has had a reasonable opportunity of being heard in support of the same;

(b) no appeal, where the appellant is in custody, shall be dismissed unless the appellant's legal practitioner (if the Court has been notified that he has a legal practitioner) has had such opportunity.

(2) Before dismissing an appeal under this section, the Court may call for the record of the case but shall not be bound to do so.

17.—(1) If the High Court does not dismiss the appeal summarily, it shall call upon the District Appeals Local Court to cause the record of the case to be prepared and to forward three copies thereof to the Registrar of the High Court. Preparation and contents of record

(2) The record of appeal shall contain legible copies of the following items arranged in the following order—

(a) the record of proceedings in the Local Court of first instance as submitted to the District Appeals Local Court;

(b) the notes taken at the hearing of the appeal in the District Appeals Local Court;

(c) the judgment of the District Appeals Local Court.

18. The Registrar of the High Court shall cause notice to be given to the appellant or his legal practitioner and to the prosecutor, of the time and place at which the appeal shall be heard and shall furnish the prosecutor with a copy of the proceedings and the petition of appeal. Notice of time and place of hearing

Order of the
High Court

19.—(1) When a case is decided on appeal by the High Court, it shall certify its judgement or order to the District Appeals Local Court from which the appeal was brought.

(2) The District Appeals Local Court to which the High Court certifies its judgement or order shall there upon make such orders as are conformable to the judgement or order of the High Court and, if necessary, the record shall be amended in accordance therewith.

PART III—APPEALS IN CIVIL CASES

DIVISION I—Appeals to the District Appeals Local Courts

Notice of
appeal

20.—(1) Subject to subrule (3), any party to civil proceedings in a court of first instance who is aggrieved by any order or decision of such court in such proceedings may appeal to a District Appeals Local Court by—

(a) giving notice of appeal;

(b) paying the prescribed fee for appeal; and

(c) depositing in the court of first instance any compensation, damages, costs or other sums which he is liable to pay under the order or decision appealed from.

(2) Every notice of appeal shall state the grounds of objection to the order or decision, and in particular shall specify whether the appeal is against the whole or part of the order or decision or whether the appeal is against any liability for the payment of any compensation, damages or costs arising out of such order or decision.

(3) If the appellant satisfies the court of first instance that he is without sufficient means, such court may accept a notice of appeal without payment in full of the amount of compensation, damages, costs or others sums specified in subrule (1) on payment of such deposit, if any, as the court may in its discretion think proper:

Provided that a District Appeals Local Court may, on application, alter or vary any order or direction made under this subrule.

Extension of
time in civil
appeal

21.—(1) Application for leave to appeal out of time under section 29 of the Act shall be made to the court of first instance from whose order or decision it is desired to appeal.

(2) The court of first instance shall forward the application to the appeal court with a note of the relevant facts.

(3) The appeal court shall, if it considers that such leave should be given, fix a date on or before which notice of appeal shall be given and the fee if any, for appeal shall be paid to the court of first instance.

Record of
proceedings in
civil appeals

22.—(1) This rule shall apply to civil appeals in which the appellant has duly given notice of appeal.

(2) On receipt of the notice of appeal, the clerk of the court of first instance shall forthwith notify the appeal to the appeal court having jurisdiction in the matter and shall prepare and forward copies of court record for each of the parties concerned in the appeal and for the District Appeals Local Court having jurisdiction.

(3) The record of proceedings shall consist of a copy of—

(a) the summons, claim or complaint which originated the proceedings and any other pleadings;

(b) the notes of evidence taken in the case and all documentary evidence;

(c) the order or judgment appealed from;

(d) the notice and grounds of appeal.

23.—(1) On receipt of the record of proceedings, the District Appeals Local appeal Court shall fix a place and time for the hearing of the appeal and the clerk of such court shall notify the appellant and the other parties to the appeal of the time and place so fixed. Hearing of appeal

(2) Such notice of hearing shall be given not less than seven days before the date fixed for hearing.

24.—(1) All parties to an appeal shall be entitled to be present at the hearing. Attendance at hearing

(2) Where on the date fixed for the hearing of a civil appeal any of the parties to the appeal does not appear, the appeal court may, on proof of due notice having been given to the absent party of the date fixed for hearing, proceed with the hearing of the appeal or may adjourn the appeal on such terms and conditions as to the court may seem just:

Provided that where the appellant does not appear, the appeal may be dismissed summarily, but the court may, if due cause is shown, restore the appeal on such terms as it may consider proper.

25. At any time before the hearing of an appeal, any party to the appeal party not may file a declaration in writing that he does not wish to be present in person or by a legal practitioner on the hearing of the appeal, together with two copies of such arguments as he desires to submit to the District Appeals Local Court, and serve a copy of such declaration and arguments upon every other party and thereupon the appeal shall be dealt with as if the party had appeared. Submission by party not appearing

26. If an appellant fails to appear when his appeal is called on for hearing of appellant and has not taken action under rule 25, the appeal may be struck out or dismissed with or without costs. Non-appearance of appellant

27. If a respondent fails to appear when an appeal is called on for hearing of respondent and has not taken action under rule 25, the court may proceed to hear the appeal ex-parte. Non-appearance of respondent

Application
to set aside
ex-parte
judgement

28. Where an appeal has been heard ex-parte under rule 27 and a judgment has been entered adverse to the respondent, the respondent may apply to the District Appeals Local Court, within twenty-one days of such judgment to set aside judgment and have the appeal re-heard:

Provided that a respondent who has failed within the period of twenty-one days to make application may nevertheless, at any time within a further period of three months thereafter, apply to the District Appeals Local Court, on giving notice to the appellant, to set aside such judgment, and the District Appeals Local Court, if satisfied that good and sufficient cause has been shown for the application being made out of time, may grant the application and make such order in relation thereto or as to costs as it may deem fit in the circumstances.

Evidence

29. A District Appeals Local Court may, in any civil appeal, if it considers it necessary so to do in the interests of justice, direct that the appeal shall be conducted by way of re-hearing and that all or any witnesses may be recalled to give their evidence.

Costs

30. A District Appeals Local Court, may, in any civil appeal, make such order as the justice of the case requires regarding—

(a) the expenses reasonably incurred in travel to and from court by the parties and witnesses;

(b) reasonable compensation for time necessarily occupied in such travel and in attending court, of the parties to the proceedings and the witnesses, including refund of any sums paid for any of such purposes by a successful appellant as prescribed in the Second Schedule.

DIVISION II – Appeals to the High Court

Notice of
appeal

31.—(1) Appeals to the High Court in civil matters shall be brought by appeal giving notice of appeal in Form I in the First Schedule:

Provided that a person may indicate his or her intention to appeal orally in the District Appeals Local Court by which an order or judgment against which he or she intends to appeal was made and such statement shall be noted on the court record and it shall be deemed to be a notice in writing to the High Court of his or her intention to appeal.

(2) The appellant may appeal from the whole or any part of the judgment, and the notice of appeal shall state whether the whole or part only, and what part, of the judgment is complained of.

(3) The notice of appeal shall be filed in the District Appeals Local Court in which the judgment appealed against was pronounced.

(4) The appellant shall pay the fees prescribed in the Second Schedule for such notice of appeal.

(5) The notice of appeal shall be served by the appellant on all parties directly affected by the appeal or their legal practitioners:

Provided that upon payment of the prescribed fee by the appellant, the court in which the judgment appealed from was pronounced shall serve or cause to be served the notice of appeal on such parties or their legal practitioners.

32. The appellant shall within such time as the District Appeals Local Court directs deposit a sum fixed to cover the estimated expense of preparing the record of appeal: Cost of record

Provided that the District Appeals Local Court may, if it thinks fit, dispense in the whole or in part with the payment of any sum chargeable under this rule on the basis that the appellant is not in a position to pay due to poverty.

33. The appellant shall, within such time as the District Appeals Local Court directs, deposit such sum as may be determined by such Court or give security therefor by bond with one or more sureties for the due prosecution of the appeal and for the payment of any costs which may be ordered to be paid by the appellant. Security for costs

34.—(1) When the appellant has complied with the foregoing rules, the District Appeals Local Court shall prepare the requisite number of copies of the record of appeal. Preparation and contents of record

(2) The record of appeal shall contain legible copies of the following items arranged in this order—

(a) the record of proceedings in the Local Court submitted to the District Appeals Local Court;

(b) the notes taken at the hearing of the appeal in the District Appeals Local Court;

(c) the judgment of the District Appeals Local Court.

(3) As soon as the copies of the record of appeal are ready, the District Appeals Local Court shall serve the appellant with a notice in Form 2 in the First Schedule and shall supply the appellant with one copy of the record of appeal.

(4) Within fourteen days from the service upon him of the notice referred to in subrule (3), the appellant shall prepare a memorandum in writing setting forth the grounds of appeal and shall forward to the District Appeals Local Court the number of copies of the memorandum called for in the notice.

35. On receipt of the copies of memorandum of appeal, the District Appeals Local Court shall forthwith forward to the High Court the record and memorandum of appeal. Transmission of record of appeal

Submission by party not appearing **36.** At any time before the hearing of the appeal any party to the appeal may file a declaration in writing that he does not wish to be present in person or by a legal practitioner on the hearing of the appeal, together with two copies of such arguments as he desires to submit to the High Court, and serve a copy of such declaration and arguments upon every other party and thereupon the appeal shall be dealt with as if the party had appeared.

Non-appearance by appellant **37.**—(1) If the appellant fails to appear when his appeal is called on for hearing and has not taken action under rule 36, the appeal may be struck out or dismissed with or without costs.

(2) When an appeal has been struck out owing to the non appearance of the appellant, the High Court may, on application by the appellant on such terms as to costs or otherwise as it may deem just, direct the appeal to be re-entered for hearing.

(3) An application to re-enter an appeal for hearing under this rule shall be made within of thirty days from the date on which the appeal was struck out or dismissed:

Provided that an appellant who has failed within the period of thirty days to make application under this rule may at any time within a further period of ninety days thereafter, apply to the High Court to re-enter that appeal and the High Court on being satisfied that good and sufficient cause has been shown for the application being made out of time, may grant the application and make such order in relation thereto or as to costs as it may deem fit in the circumstances.

Non-appearance of respondent **38.** If the respondent fails to appear when the appeal is called on for hearing and has not taken action under rule 14, the High Court may proceed to hear the appeal ex parte.

PART IV—MISCELLANEOUS

Waiver of non-compliance **39.** Non-compliance with these Rules shall not prevent the prosecution of non-compliance an appeal if the District Appeals Local Court or the High Court, as the case may be, considers that such non-compliance was not willful and that it is in the interests of justice that the non-compliance be waived.

Stay of execution and admission to bail pending appeal **40.**—(1) Notice of intention to appeal shall not operate as a stay of and admission execution of any sentence or order, but the court of first instance which sentence of imprisonment or made the order, may order that any such passed the sentence or order be stayed pending the hearing of an appeal and if the appellant is in custody that he may be released on bail with or without sureties, pending such hearing.

(2) If the appeal is ultimately dismissed and the original sentence confirmed or some other sentence of imprisonment substituted therefore the time during which the appellant was released on bail shall not be included in calculating the period of imprisonment still to be served.

LOCAL COURTS (CRIMINAL PROCEDURE) RULES
ARRANGEMENT OF RULES

Under section 45

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LOCAL COURTS (CRIMINAL PROCEDURE) RULES

PART I—PRELIMINARY

Citation **1.** These Rules may be cited as the Local Courts (Criminal Procedure) Rules.

Interpretation **2.** In these Rules, unless the context otherwise requires—
“date of hearing” include a date to which the hearing is adjourned;

PART II—COMMENCEMENT OF PROCEEDINGS

Registers **3.** At every Local Court, the clerk shall keep a criminal register in respect of criminal cases and a juvenile register in respect of cases involving juveniles.

Identification number of case **4.—(1)** A serial number shall be given to every case according to the year in which the case started and shall indicate whether such case is entered in the criminal register or juvenile register.

(2) All documents in a criminal case, shall bear the serial number of that case, which shall be written at the top of the first page.

Commencement of criminal cases **5.—(1)** Proceedings in criminal matters may be instituted by a public prosecutor or police officer signing and presenting a formal charge to a Chairperson.

(2) Upon presentation of a formal charge to a Chairperson, a clerk shall enter the case in the criminal register or the juvenile register, whichever is applicable, and shall give it a serial number and unless the accused is in custody, shall prepare a summons in Form 1 in the First Schedule.

(3) Any charge prepared pursuant to this rule shall be in accordance with the provisions of section 128 of the Criminal Procedure and Evidence Code.

6.—(1) A summons in a criminal case shall be prepared in duplicate and shall be signed by the Chairperson and shall be served on the accused not less than seven clear days before the date of hearing. Particulars to be entered

(2) The summons shall state briefly the offence with which the accused is charged, and shall specify the written law creating the offence concerned.

7.—(1) Once a case has been entered in a register, the Local Court shall fix hearing the date of hearing. Date of hearing

(2) In fixing the date of hearing, the Local Court shall take account of necessity for service of the summons to be effected on the accused not less than seven clear days before the date of hearing, and the places of residence of any witnesses of whom the court is informed:

Provided that if the accused is present before the court and consents, the trial may proceed forthwith or on any convenient date.

8.—(1) If the accused wishes to compel the attendance of any witness to witnesses and give evidence at the trial, he shall in sufficient time for service to be effected hearing apply to the Local Court for a summons to be served on the witness. Summons to witnesses and notice of hearing

(2) Every summons to be served on a witness who resides within the area of jurisdiction of the Local Court which issues the summons shall be served not less than three clear days before the date of hearing.

(3) Every summons to be served on a witness who resides outside the area of jurisdiction of the Local Court shall be served within a reasonable time before the date of hearing as the Chairperson shall fix.

(4) In fixing the date of hearing pursuant to sub rule (3), the Chairperson shall take into account—

(a) the length of time required to send the summons by post to the Local Court of the area in which the witness resides;

(b) the probable length of time required by that Local Court to effect service; and

(c) the length of time required by the witness to travel from his place of residence to the court, and shall add to his or her estimate of those lengths of time a period of seven clear days.

Service of
summons

9.—(1) Every summons issued under rule 6 and 8 shall require the person summons named in it to appear before the Local Court on the date of hearing and shall be effected by a court marshal or other officer of the Local Court, delivering one copy to him or shall be by post.

(2) If the person named in the summons cannot be found after a careful search, the summons may be served by delivering one copy to a spouse or any adult person residing with the named person or working as a servant of the named person.

(3) The person serving the summons shall write on the back of the other copy the place, date and time when he served the summons and the name of the person upon whom it was served and that person shall be required to acknowledge service by signature or thumb print:

(4) A court marshal or any officer of a Local Court serving summons shall indorse at the back of a summons where a person refuses to acknowledge service.

(5) Where it is not practicable to effect service of summons in the manner provided in the preceeding subrules, service of summons shall be effected by post.

(6) Where service of summons is effected by post, it shall be supported by affidavit.

Failure of
witness to obey
summons

10.—(1) If any witness shall, without reasonable excuse, fail to obey any witness to obey summons lawfully issued under section 23 and in accordance with rules 8 and 9, the Local Court may issue a warrant for his arrest in Form 2 in the First Schedule.

(2) Any witness arrested on the authority of a warrant under subrule (1) shall be brought before the Local Court and may be dealt with as provided in section 23.

(3) Before imposing any punishment, the Local Court shall ask the reason for the failure to obey the summons and if it considers that the reason given amounts to a reasonable excuse the court shall not impose any punishment.

Failure of
accused to obey
summons

11. If an accused person, without lawful excuse—

(a) fails to attend before the Local Court at the time and place stated in the summons;

(b) having attended, goes away without first being given permission by the Court;

(c) fails to attend after an adjournment of the court after being told by the court so to do, the Court may issue a warrant in Form 3 in the First Schedule for his or her arrest and for him or her to be brought before the Local Court:

Provided that no such warrant shall be issued in respect of failure to attend before the Court at the time and place stated in the summons unless the court is satisfied that the accused has been served with the summons.

12.—(1) Subject to subrule (2), the provisions of section 93 of the Criminal section 93 of Procedure and Evidence Code (which relates to the powers of magistrates to Procedure and dispense with attendance of an accused person) shall apply in relation to the Cap. 8:01 trial of such cases in a Local Court.

Application of
section 93 of
the Criminal
Procedure and
Evidence
Code Cap.
8:01

(2) In its application to such cases in a Local Court, the said section shall have effect as if for the term “magistrate” wherever else it occurs in the said section there were substituted the term “Chairperson”.

13.—(1) Where any Local Court, either on the application of any party to a to be brought case pending before it or on its own motion, desires that any person confined in any prison should be examined as a witness in the hearing of such case,

Power of court
to order
prisoner to be
brought to
give evidence

such Local Court may issue an order in Form 4 in the First Schedule to the officer in charge of such prison requiring him to bring such prisoner in proper custody, at a time to be named in the order, before the court for examination.

(2) The officer so in charge, on receipt of such order, shall act in accordance therewith and shall provide for the safe custody of the prisoner during his absence from the prison for the purpose aforesaid.

PART IV—EVIDENCE

14.—(1) Before giving evidence in any criminal case, a witness shall make witnesses an oath or affirmation in accordance with the Oaths, Affirmations and Declarations Act:

Swearing of
witnesses

Provided that where a Local Court is satisfied that a witness is unable by reason of immature age to understand the nature of either an oath or affirmation, the court may receive his or her evidence, though not given on oath or affirmation, if, in the opinion of the Court, he or she has sufficient intelligence to justify the reception of his evidence.

(2) If a witness is to be sworn, he shall hold his right hand uplifted and repeat the words “I swear by Almighty God that the evidence I shall give shall be the truth, the whole truth and nothing but the truth”.

(3) If a witness is to be affirmed he shall raise his right hand and repeat the words “I solemnly, sincerely and truly declare and affirm that the evidence I shall give shall be the truth, the whole truth and nothing but the truth”.

(4) In every case there shall be noted on the court record whether a witness has been sworn or affirmed or whether his evidence has been taken without oath or affirmation under subrule (1).

(5) Where the evidence is received by a court in criminal proceedings in accordance with the proviso to subrule (1), the accused shall not be liable to be convicted on such evidence unless it is corroborated by some other material evidence implicating him or her.

Recording of
evidence

15.—(1) In every trial the evidence shall be recorded in writing in the English language by the Chairperson.

(2) Notwithstanding subrule (1), the Court may receive evidence in the language of the court as may be approved by the Chief Justice.

(3) At the close of each hearing, the Chairperson shall—

(a) sign his or her name and the date at the last line of the record; and

(b) shall record the time when the sitting of the court ceased.

Doubt regarding
jurisdiction and
transfer of case
to a Magistrate
Court

16.—(1) If at any stage of a case, a Local Court is not satisfied that jurisdiction to try the case, the court shall—

(a) seek directions from the nearest magistrate court; and

(b) if necessary, adjourn the case and submit the case record and the reasons therefor to such magistrate.

(2) Where a Local Court adjourns and transfers a case to a magistrate court, it shall order the accused to appear before the magistrate court to which the case has been transferred at such time and such place as may be appointed and stated in the presence and hearing of the party or parties or their respective legal practitioners then present, and in the meantime may suffer accused to go at large, or may commit him to prison, or may release him upon his entering into a bond, with or without sureties, at its discretion, conditioned for his appearance at the time and place appointed before the court to which the case has been transferred.

(3) An adjournment under this rule shall not be for a longer period than is reasonably necessary in the circumstances of the case and shall not in any event exceed thirty days or, if the accused is committed to prison, fifteen days and the day following that on which the order is made shall be counted as the first day.

(4) A Local Court may, on application or of its own motion, at any stage in a trial, transfer such trial for hearing before itself at some other place.

Adjournments

17.—(1) A Local Court may from time to time adjourn the hearing of any case for a reasonable period —

(a) if the accused or a witness is absent, or is otherwise unable or unfit to take part in the proceedings;

- (b) if the hearing continues for more than a day;
- (c) if the court is not satisfied that it has jurisdiction to hear the case;
- (d) for any sufficient reason to be recorded on the record of the case.

(2) If the accused is in custody and is not admitted to bail, the period of an adjournment shall not exceed seven days.

(3) If the accused is refused bail or is unable to comply with the conditions relating to bail, he shall be remanded in custody and a warrant in Form 5 in the First Schedule shall be signed by the Chairperson.

18. Every case shall be called for hearing on the date fixed for the hearing called on and shall be either disposed of or adjourned.

Cases to be called on date of hearing

19.—(1) If the prosecutor is either absent or unwilling to proceed with the prosecutor case against the accused, the court, if it is satisfied that the prosecutor has had reasonable notice of the time and place fixed for the hearing shall unless it considers there is good reason to adjourn the hearing, discharge the accused.

Absence of prosecutor

(2) A discharge under subrule (1) shall not operate as a bar to any subsequent proceeding against the accused on account of the same facts.

(3) If the Local Court is not satisfied as provided in subrule (1) or considers that there is a good reason for adjournment, the court shall adjourn the hearing.

PART V—PROCEDURE ON TRIAL

20.—(1) The hearing of a criminal case shall commence in the following criminal cases manner—

Hearing of criminal case

(a) the Chairperson shall read and explain to the accused the charge against him;

(b) the Chairperson shall ask the accused whether he admits or denies committing the acts alleged;

(c) if the accused admits that he has committed the acts complained of, the Chairperson shall record his admission as nearly as possible in the words used by him and shall record a plea of Guilty and in all other cases the Chairperson shall record a plea of Not Guilty.

(2) Before a plea of Guilty is recorded, the court shall ascertain that the accused understands the nature and consequences of his plea and that he or she intends to admit without qualification the truth of the charge against him.

21.—(1) Every objection to a charge for any formal defect on the face charge thereof shall be taken immediately after the charge has been read over to the accused and not later.

Alteration of charge

(2) Where, before the court complies with rule 26, it appears to the court—

(a) that the charge is defective either in substance or form;

(b) that the evidence discloses an offence other than the offence with which the accused is charged; or

(c) that the accused desires to plead guilty to an offence other than the offence with which he is charged, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge as it thinks necessary to make in the circumstances of the case, unless, having regard to the merits of the case, such amendments cannot be made without injustice.

(3) Where a charge is so amended, a note of the order for amendment shall be endorsed on the charge and the charge shall be treated for the purposes of the proceedings in connection therewith as having been filed in the amended form.

(4) Every such new or altered charge shall be read and explained to the accused.

(5) The court shall thereupon call upon the accused to plead to the altered charge and to state whether he is ready to be tried on such new or altered charge.

(6) If the accused declares that he is not ready, the court shall duly consider the reasons he may give and, if proceeding immediately with the trial is not likely in the opinion of the court to prejudice the accused in his defence or the prosecutor in the conduct of the case, the court may, after such new charge or alteration has been framed or made, proceed with the trial as if the new or altered charge had been the original charge.

(7) If the new or altered charge is such that proceeding immediately with the trial is likely in the opinion of the court to prejudice the accused or the prosecutor, the court may direct a new trial or adjourn for such period as is necessary.

(8) If the offence stated in the new or altered charge is one for the prosecution of which previous sanction is necessary, the case shall not be proceeded with until such sanction is obtained, unless sanction has already been obtained for a prosecution on the same facts as those on which the new or altered charge is founded.

(9) Variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for such variance if it is proved that the proceedings were instituted within the time limited by law for the institution thereof.

22. If the accused pleads guilty—Procedure on
plea of guilty

(a) the prosecutor shall inform the court briefly of the facts of the case;

(b) the Chairperson shall then ask the accused if he admits those facts;

(c) if the accused admits the facts as stated by the prosecutor, the Chairperson shall inform the accused that he may, if he so wishes, address the court on those facts and say anything he wishes which would lessen the gravity of those facts; and

(d) if during the course of any statement made by the accused in paragraph (c) it becomes clear that the defendant denies any essential element of the charge against him, the Chairperson shall amend the plea of Guilty recorded to one of Not Guilty, and shall then proceed to the trial of the case.

23. If the accused does not admit the truth of the charge, or does not plead, the court shall proceed to hear the case as hereafter provided.Procedure on
plea of not
guilty

24.—(1) In cases where Rule 23 applies, the court shall proceed to hear the the prosecution public prosecutor and to take all evidence as is adduced in support of the prosecution's case.

Evidence for
the
prosecution

(2) The public prosecutor shall call witnesses to prove the prosecution's case and, before the witnesses are examined, they shall be sworn or affirmed in accordance with rule 14.

(3) Each witness shall state his name, address and occupation and shall then be examined in chief by the prosecution and shall answer any relevant questions put to him by the public prosecutor which the court considers proper.

(4) After examination in chief, the Court shall inform the accused that he is entitled to cross-examine that witness and the accused may ask such questions in cross-examination as the Court considers proper.

(5) The public prosecutor may re-examine each prosecution witness after cross-examination where he or she considers it necessary to do so and the re-examination shall be directed at explaining a matter referred to by the accused in cross-examination only.

(6) Where a new matter is introduced during re-examination by permission of the court, the Court shall inform the accused of his right to cross-examine the witness on that new matter only.

(7) After the re-examination or cross examination, if any, of each witness the court may examine the witness on any issue in order to discover or obtain proper proof of relevant facts; and the parties may neither object to such examination nor without leave of the court, cross-examine any witness upon any answer given in reply to such examination.

(8) After the public prosecutor has called all his witnesses he shall close the case for the prosecution.

Submission of
no case to
answer

25. At the close of the evidence for the prosecution the accused or his legal practitioner may address the court for the purpose of submitting that a case has not been made out against the accused sufficiently to require him or her to make a defence and the prosecution shall have the right to reply to such submission.

Procedure on
close of
prosecution
case

26.—(1) If, upon taking all the evidence from the prosecution and any evidence which the court may decide to call under rule 24, the Court is of opinion that no case is made out against the accused sufficiently to require the accused to make a defence, it shall deliver a judgment in the manner provided under rule 31 acquitting the accused.

(2) If, when the evidence referred to in subrule (1) has been recorded, the Court is of the opinion that a case has been made out against the accused sufficient to require him to make a defence in respect of—

(a) the offence charged the Chairperson shall again explain the charge to the accused; or

(b) some other offence which such court is competent to try, the Court shall consider the charge and if necessary shall amend it subject to rule 21.

(3) The charge, if amended shall be read to the accused and he shall be asked if he admits or denies the charge.

(4) If the accused does not admit the truth of the charge as amended or if no amendment is made, the accused shall be informed by the court that he has a right to remain silent or to give evidence upon oath and, if he elects to give evidence upon oath, he shall be asked whether he has any witness to examine or other evidence to adduce in his defence.

Evidence for
the accused

27.—(1) The Court shall then hear the accused and his or her witnesses and before the witnesses are examined they shall be sworn or affirmed in accordance with rule 14.

(2) If the accused states that he has a witness or witnesses to call but that they are not present and the Court is satisfied that—

(a) the absence of a witness is not due to any fault of the accused; and

(b) that it is likely that these witnesses could give relevant evidence on behalf of the accused, the court may adjourn the trial and issue summons to secure attendance of such witness.

(3) Where an accused elects to call witnesses other than himself, his evidence shall be taken before that of any other witness for the defence.

(4) Where the accused elects to give evidence but refuses to—

(a) be sworn or affirmed;

(b) give evidence;

(c) answer any question lawfully put to him by the public prosecutor or the Court; or

(d) produce any document or thing which he is required to produce, such refusal shall be noted by the Court and may be taken into account by it in reaching its decision.

(5) Each witness shall give his name, address and occupation and shall state what he knows about the case and shall be cross-examined by the public prosecutor and re-examined by the accused in the same manner as is provided under rule 24.

(6) After the re-examination, if any, or cross-examination the Court may examine the witness on any issue in order to discover or obtain proper proof of relevant facts and neither party may object to such examination, nor, without leave of the Court, cross-examine any witness upon any answer given in reply to such examination.

(7) After the accused has called all his or her witnesses, he or she shall close the case for the defence.

28. The Chairperson may, in order to discover or to obtain proper proof of to put questions relevant facts, ask any question, at any time, of any witness or of the parties about any fact relevant or irrelevant and may order the production of any document or thing.

Courts power
to put
questions to
prosecution or
defence
witness

29.—(1) The prosecution shall be entitled, but shall not be required, to address the court before calling evidence

Addresses

(2) When the accused is called upon to make a defence, he or his legal practitioner may,

(a) before his evidence, open his case stating the law on which he intends to rely; and

(b) if the accused gives evidence or witnesses are examined on his behalf, sum up his case.

(3) The prosecution shall have the right to reply on the whole case.

30. A Local Court may at any stage of a case summon or call any person may call as a witness or ask any person present but not summoned as a witness any as witnesses, questions essential to the case or recall and ask further questions essential to etc the case of any person already questioned:

Chairperson
may call as
witnesses
persons not
summoned as
witnesses, etc

Provided that the accused person and the prosecutor shall have the right to ask any such person any questions essential to the case.

PART VI—PROCEDURE ON DELIVERING JUDGEMENT, CONVICTION, ETC

Recording and
delivery of
judgment

31.—(1) The Court, having heard both the prosecution and the accused and their witnesses, and their submission, if any, shall deliver a judgment, either forthwith or on such a day as it may appoint within a reasonable period.

(2) Every judgment shall be recorded in writing and shall contain the reasons for it and shall be signed by the Chairperson who shall deliver it in open Court.

(3) Where the Court, after considering all evidence properly before it, is of the opinion that there is doubt regarding the guilt of the accused, the Court shall acquit the accused of the offence charged.

(4) If the Court acquits the accused, the Court shall, provided no other charge is pending against him, forthwith release the accused.

(5) Where the Court, after considering all the evidence properly before it, is satisfied that the offence is proved beyond reasonable doubt against the accused it shall convict the accused of the offence charged.

(6) If the Court convicts the accused the Court shall record the conviction and pass sentence or make an order against him according to law either forthwith or on such a day as the Court may appoint within a reasonable period.

Passing of
sentence

32.—(1) The court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed.

(2) Evidence that the court may receive under subrule (1) may, in addition to the evidence of the accused or the prosecution, include evidence by or on behalf of the victim of the offence and any relevant reports to enable the court assess the gravity of the offence.

(3) The sentence of the court shall be recorded in writing and signed by the Chairperson, together with the reasons for it, and such sentence and reasons shall be delivered in open court in the presence of the accused.

Person not to
be punished
twice for same
offence

33. No person shall be prosecuted twice for a criminal act or omission of which he or she has previously been convicted or acquitted.

Right to
appeal to be
explained

34.—(1) Immediately after passing sentence on the convicted person, the Chairperson shall inform such person of his or her right of appeal as laid down in section 41.

(2) If the defendant is sentenced to imprisonment and wishes to appeal, the Chairperson shall inform him of his or her right to apply for bail pending the hearing of his or her appeal.

35.—(1) The bond to be entered into by any person ordered under section 23 (7) to enter into a bond to keep the peace and be of good behaviour shall be in Form 6 in the First Schedule.

Binding over
to appear for
judgment

(2) The bond shall be signed by such person and the sureties, if any, in the presence of the Chairperson who shall thereupon himself sign it.

36.—(1) A warrant in Form 7 in the First Schedule signed by the Chairperson of the Court by which any person has been sentenced to imprisonment, ordering that the sentence shall be carried out in a specified prison within Malawi shall be full authority to the officer in-charge of such prison and to all other persons for the carrying into effect of the sentence described in such warrant unless the court specifies otherwise.

Warrant for
sentence of
imprisonment

(2) Subject to section 35 of the Penal Code every sentence of imprisonment shall be deemed to commence from, and to include, the whole of the day on which it was pronounced unless the Court specifies otherwise.

37. An order in Form 8 in the First Schedule signed by the Chairperson of the Court by which any person has been ordered to perform public work community under any written law or under section 339 of the Criminal Procedure and Evidence code to perform Community Service shall be full authority for the employment of such person on public work or community service under the provisions of the respective Acts.

Order to
perform public
work or
community
service

PART VII—FINES

38. All fines imposed by a Local Court shall be paid to the clerk of such court who shall deposit of the same into the Consolidated Fund.

Fines

39. If any fine, or any part of a fine, imposed by a Local Court shall pay finebe unpaid after the expiry of such time as the Local Court imposing the fine may allow, the Chairperson of the Local Court which imposed the fine may, for the purposes of enforcing any sentence imposed in default of his paying such fine, issue a warrant for the arrest of the person failing to pay the fine in Form 9 in the First Schedule.

Failing to pay
fine

40. The fees specified in the second column of the Second Schedule shall be payable in respect of proceedings in Local Courts, specified opposite thereto in the Schedule.

Fees

PART VIII—MISCELLANEOUS

41. If a Chairperson of a Local Court has any personal interest in any case having interest before the court, such Chairperson shall not preside over proceedings of the court relating to such case.

Chairperson
having interest
in case.

Powers of
arrest by
court marshal

Cap. 8:01

42. Every court marshal shall have the power, in the execution of any arrest by lawful warrant or order issued or made by a court in exercise of jurisdiction conferred by the Act and these Rules, to arrest the person named in such warrant or order in the manner laid down in section 20 of the Criminal Procedure and Evidence Code.

FIRST SCHEDULE

FORM I

MALAWI

In the Local Court

Criminal Case No of 20

Republic

(1)

versus

(2)

CRIMINAL SUMMONS

(RULE 5 OF THE LOCAL COURT (CRIMINAL PROCEDURE) RULES)

To: (2)

(3)

You are ordered to come to the court house at (4)
on (5) day the day of20 at o'clock in the ^{fore*}noon
after

to answer a charge that (6)

.....

.....

and that you thereby committed an offence under

*Section

By-law

Rule of (6)

Regulation

If you fail to come to court you will be liable to arrest, and to punishment
for your failure.

Seal

.....

Chairperson

Date:

*Delete whichever is inapplicable

NOTE – See below for instructions on how to complete the form.

(¹) Insert accused name.

(²) Insert name of accused.

(³) Insert address of accused.

(⁴) Insert place where accused is to come.

(⁵) Insert day, date and time of hearing.

(⁶) Refer to rules relating to Criminal Summons and set out particulars accordingly.

FORM 2

MALAWI

In the Local Court

Criminal Case No of 20

Republic

()

Versus

()

WARRANT FOR ARREST OF WITNESS

(RULE 10 OF THE LOCAL COURT (CRIMINAL PROCEDURE) RULES)

To all Messengers of the Court, and to
all Police Officers.

WHEREAS () of
 was summoned
 to attend the above Court on () day the day of
 20, for the purpose of giving evidence and failed to do so
 you are hereby directed to arrest the said () and
 to produce him before this Court in execution of this your Warrant and HEREIN
 FAIL NOT.

Dated this day of 20

.....
Chairperson..... *Local Court*

NOTE:—See below for instructions on how to complete the form.

1. Insert name of accused.
2. Insert name and address of witness.
3. Insert day, date and time when witness was summoned to appear.
4. Insert name of witness

FORM 3

MALAWI

In the Local Court.

Criminal Case No. of 20

Republic

.....

versus

.....

WARRANT FOR ARREST OF ACCUSED

(RULE 11 OF THE LOCAL COURT (CRIMINAL PROCEDURE) RULES)

To all Court Messengers and Police Officers

WHEREAS ⁽²⁾ of
 was summoned to attend the above Court on the day
 of 20, and failed to do so*/attended the above
 Court on the day of 20 and
 went away without first being given the permission of the Court*/failed to attend
 after an adjournment of the Court after being told by the Court to so attend you are
 hereby directed to arrest the said ⁽³⁾ and to produce him before
 this Court in execution of this your Warrant and

HEREIN FAIL NOT

Dated this day of 20

Seal

.....

Chairperson

..... Local Court

- Delete whichever does not apply.

NOTE:—See below for instructions on how to complete the form.

⁽¹⁾ Insert name of accused.⁽²⁾ Insert name and address of accused.⁽³⁾ Insert name of accused.

FORM 4

MALAWI

In the Local Court

..... Case No of 20

Republic

()

versus

(1)

ORDER FOR PRODUCTION OF PRISONER AS WITNESS

(RULE 19 OF THE TRADITION COURTS (PROCEDURE) RULES)

To the officer in charge of the Prison at (2)

WHEREAS (3) is confined as a prisoner in the said prison

AND WHEREAS this Court is desirous that the said (4)
..... be examined before it as a witness;You are hereby ordered to produce the said (5)
before this Court in proper custody on the (6) dayof 20 at o'clock in the ^{*fore} noon
after

for the purpose of his or her being examined as aforesaid.

Dated this day of 20
Seal.....
Chairperson..... *Local Court*

*Delete whichever does not apply.

NOTE:—See below for instructions on how to complete the form.

(1) Insert ame of accused.

(2) Insert name of place.

(3) Insert name of prisoner who is required as a witness.

(4) Insert date and time when prisoner is required to attend.

FORM 5

MALAWI

In the Local Court.

Criminal Case No of 20

Republic

.....
versus

(1)

WARRANT OF COMMITTAL ON REMAND

(RULE 17 OF THE LOCAL COURTS (PROCEDURE) RULES)

To the officer in charge of the Prison at ⁽²⁾WHEREAS ⁽³⁾of stands charged with the officer of ⁽⁴⁾.....
under section ⁽⁵⁾ of ⁽⁶⁾ these are to command you to lodge the said ⁽⁷⁾ in theprison at ⁽⁸⁾ and to keephim there safely until the ⁽⁹⁾ day ofnext when you shall bring the said ⁽¹⁰⁾

before this Court

at ⁽¹¹⁾ o'clock in the *fore noon.
after

Dated this day of 20

.....

Chairperson..... *Local Court*

*Delete as applicable.

NOTE:—See below for instructions on how to complete the form.

⁽¹⁾ Insert name of Accused.⁽²⁾ Insert name and place.⁽³⁾ Insert name and address of Accused.⁽⁴⁾ Insert offence.⁽⁵⁾ Insert section number.⁽⁶⁾ Insert law.⁽⁷⁾ Insert name of Accused.⁽⁸⁾ Insert name of place.⁽⁹⁾ Insert date of adjourned hearing.⁽¹⁰⁾ Insert name of Accused.⁽¹¹⁾ Insert time.

FORM 6

GOVERNMENT OF MALAWI

In the Local Court

Criminal Case No. of 20

The Republic versus ⁽¹⁾BOND TO KEEP THE PEACE AND BE OF GOOD BEHAVIOUR
(SECTION 23 (7) OF LOCAL COURTS ACT)

WHEREAS I, ⁽²⁾ have
been called upon to keep the peace and be of good behaviour for the period of
.....⁽³⁾ from the date shown on this Bond.

Now I hereby agree to keep the peace and be of good behaviour and further agree
that if I should in any way fail to do so during the period stated I shall forfeit to the
Government the sum of⁽⁴⁾

Signed this day of 20

..... ⁽⁵⁾*Signature*

2. We also agree that if the above-named fails to kept the peace and be of good
behaviour during the period stated we shall forfeit the amounts to Government
shown against our names below—

Firsty Surety

Second Surety

Name K Name K

Address:

Occupation

Signed⁽⁶⁾ Signed ⁽⁶⁾

This Bond has been signed before me this..... day of..... 20.....

.....

Chairperson

Court Seal

NOTES:

⁽¹⁾ Enter name of accused.⁽²⁾ Enter name of accused.⁽³⁾ Enter period for which he must be of good behaviour⁽⁴⁾ Enter amount to be promised by accused (amount will be fixed by court)⁽⁵⁾ Signature of accused.⁽⁶⁾ Signatures of Sureties, if any required.

FORM 7

MALAWI

In the Local Court

Criminal Case No of 20

Republic

.....
versus

(1)

WARRANT OF COMMITTAL

(RULE 36 OF THE LOCAL COURTS (PROCEDURE) RULES)

To the officer in charge of the Prison at (2)

WHEREAS (3)
was on this day convicted of the offence of (4)Under section (5) of (6) and was
sentenced to:

*(a) imprisonment for a period of (7)

*(b) a fine of (8) or in default of
payment of imprisonment for a period of (9)AND WHEREAS of the said fine the whole* (or sum of (10) K.....) remains
unpaid.You are hereby required to receive the said (11)
in the said prison together with this Warrant and there carry the aforesaid sentence
into law.Dated this day of 20
Seal.....
Chairperson

..... Local Court

*Delete whichever does not apply.

NOTE:—See below for instructions on how to complete the form.

- (1) Insert name of accused.
- (2) Insert name of place.
- (3) Insert name and address of defendant.
- (4) Insert offence.
- (5) Insert section number.
- (6) Insert law.
- (7) Insert number of days, weeks or months.
- (8) Insert amount.
- (9) Insert number of days, weeks or months.
- (10) Insert sum.
- (11) Insert name of defendant.

MALAWI
COMMUNITY SERVICE (GENERAL) RULES
COMMUNITY SERVICE ORDER

Filed by: Clerk of Court

- Copies: 1. Retain at sentencing court.
2. Send to coordinating body for community service (district/region provincial as necessary).
3. Send to head of institution where service is to be performed.

CASE NUMBER:	
First offender (circle one): yes / no	Has offender served C.S. before? Yes/no
Total hours ordered;	Date ordered:
Date work to start:	Completion period:

Offender's Surname	
First name	Middle initial (s)
Address	Nationality
Village	Traditional Authority
District	Marital Status
Date of birth ¹	Educational level
Sex (circle one) <i>male/female</i>	Occupation

Court	Judicial Officer's name
Address	Phone
Offence ²	Estimated custody time ³

.....
Chairperson

..... *Local Court*

1. If date is known, fill in year of birth. If year is also unknown, write "juvenile" or "adult"
2. Include chapter/section number from penal code whenever possible.
3. Sentencing judge should estimate the custody time the offender would serve of community service were not an option. If the offence would not normally involve custody (but rather a fine, probation, etc.), enter "none" in this box.

FORM 9

MALAWI

In the Local Court

Criminal Case No of 20

Republic

.....

versus

(1)

WARRANT OF ARREST FOR FAILING TO PAY FINE

(RULE 39 OF THE LOCAL COURTS (CRIMINAL PROCEDURE) RULES)

To all Court Messengers and Police Officers

WHEREAS ⁽³⁾ of was
 on the day of 20, convicted by the
 above Court of the offence of ⁽⁴⁾ and was
 ordered to pay a fine of ⁽⁵⁾ K

AND WHEREAS the whole amount of ⁽⁵⁾ K/*sum of ⁽⁶⁾ £
 being part of the said amount of ⁽⁵⁾ K
 remains unpaid, you are hereby directed to arrest the said ⁽⁷⁾
 and to produce him before this court in execution of this
 your Warrant, unless the said ⁽⁸⁾ shall sooner pay
 you the said sum of ⁽⁷⁾ K Which you
 shall pay forthwith to this Court and HEREIN FAIL NOT.

Dated this Day of, 20
 (Seal of Court)

.....
Chairperson

..... Local Court

*Delete whichever does not apply.

- (1) Insert name of accused.
- (2) Insert name and address of accused.
- (3) Insert the offence of which the accused was convicted.
- (4) Insert the amount of the fine which was imposed.
- (5) Insert the amount remaining unpaid if part of the fine has been paid.
- (6) Insert the name of accused.
- (7) Insert the amount remaining unpaid.

SECOND SCHEDULE

First Column	Second Column	Third Column
1. In all Criminal case..	No fee other than the fee prescribed in paragraph 2 for a copy of the record of the proceedings	
2. For a copy of the Record of proceedings In a Local Court Including a District Appeals Local Court, Which record shall Include any order, Judgment, decree or Decision of the Court	K50.00	Appellant

LOCAL COURTS (CIVIL PROCEDURE) RULES

Under s. 45

ARRANGEMENT OF RULES

PART I—INTERPRETATION

1. Citation
2. Interpretation

PART II—COMMENCEMENT OF PROCEEDINGS

3. Register
4. Identification number of cases
5. Jurisdiction
6. Commencement of civil matters

PART III—DATE OF HEARING AND PREPARATION AND SERVICE OF SUMMONS

7. Date of hearing
8. Particulars to be entered
9. Summons to witnesses and notice of hearing
10. Service of summons
11. Failure of witness to obey summons

PART IV—EVIDENCE

12. Swearing of witnesses
13. Recording of evidence
14. Doubt regarding jurisdiction and transfer of case to a magistrate court
15. Adjournments
16. Cases to be called on date of hearing
17. Absence of parties in a civil case
18. Absence of plaintiff.

PART V—PROCEDURE ON TRIAL OF CIVIL CASES

19. Procedure on hearing
20. Certificate of Divorce
21. Judgement delivered in absence of party
22. Right of appeal to be explained

PART VI—FEES

23. Fees
24. Power to remit fees
25. Persons by whom fees payable
26. Order for repayment of fees
27. Exemption from fees

PART VII—MISCELLANEOUS

28. Chairperson, etc, of court having interest in case

LOCAL COURTS (CIVIL PROCEDURE) RULES

Under s. 45

PART I—INTERPRETATION

Citation **1.** These Rules may be cited as the Local Courts (Civil Procedure) Rules.

Interpretation **2.** In these Rules, unless the context otherwise provides –
 “complainant” means a person making a complainant under rule 6;
 “language of the court” means the language or languages approved by the Chief Justice, in writing, as the language or languages in which the proceedings of the court are to be conducted;
 “witness” includes a complainant and a defendant who gives evidence.

PART II—COMMENCEMENT OF PROCEEDINGS

3. Register **3.** At every Local Court the clerk shall keep a civil register in respect of civil cases.

Identification **4.**—(1) A serial number shall be given to every case according to the
 number of cases year in which the case started.

(2) All documents in a case shall bear the serial number of that case which shall be written at the top of the first page.

Jurisdiction **5.** Before a complaint is accepted, the clerk shall satisfy himself after reference if necessary to the Chairperson, that the Local Court has jurisdiction to try the case emanating from such complaint.

Commencement **6.**—(1) A person desiring to start a case shall explain the facts of the
 of civil matters case of to the clerk who shall record a summary of the complaint in the complaints book.

(2) Upon payment of the prescribed fee, the clerk shall enter the case in the civil register and shall give it a serial number and shall prepare a summons in Form I in the First Schedule.

PART III—DATE OF THE HEARING AND PREPARATION AND SERVICE OF SUMMONS

Date of **7.**—(1) Once a case has been entered in a register, the Local Court
 hearing shall fix the date of hearing.

(2) In fixing the date of hearing the court shall take account of the necessity for service of summons to be effected on the defendant not less than seven clear days before the date of hearing, and the places of residence of any witnesses of whom the court is informed:

Provided that if the defendant is present before the court and consents, the trial may proceed forthwith or on any convenient date.

8.—(1) A summons in a civil case shall be prepared in duplicate and shall be signed by the Chairperson. Particulars to be entered

(2) The summons shall state briefly the substance of the complainant's claim and the amount in dispute or the value of the subject matter of the claim and such amount or value shall in no case exceed the amount in which the court has jurisdiction.

9.—(1) If the complainant wishes to compel the attendance of any witness witnesses and to give evidence at the trial, he shall in sufficient time for service to be effected apply to the court for summons to be served on the witness which shall be in Form 2 in the First Schedule: Summons to witnesses and notice of hearing

Provided that any expense to be incurred pursuant to the service of such summons shall be borne by the complainant.

(2) Every summons to be served on a witness who resides within the area of jurisdiction of the court which issues the summons shall be served not less than three clear days before the date of hearing.

(3) Every summons to be served on a witness who resides outside the court's area of jurisdiction shall be served within reasonable time before the date of hearing.

(4) In fixing such time the Chairperson shall take into account—

(a) the length of time required to send the summons by post to the Local Court of the area in which the witness resides;

(b) the probable length of time required by that Local Court to effect service; and

(c) the length of time required by the witness to travel from his place of residence to the Court, and shall add to his or her estimate of those lengths of time a period of seven clear days.

(5) A summons to be served on a defendant in a civil case shall be valid for one year only from the date on which it was issued:

Provided that the court which issued the summons may, for good reason, renew a summons from time to time for a further period of three months.

(6) In this rule and in rule 10 the words "date of hearing" include a date to which the hearing is adjourned.

10.—(1) Every summons issued under rules 6 and 8 shall require the person summons named in it to appear before the Local Court on the date of hearing and shall if reasonably practicable be served on him or her by a court marshal or other officer of the Local Court, delivering one copy to him. Service of summons

(2) If the person named in the summons cannot be found after a careful search, the summons may be served by delivering one copy to a spouse or any adult person residing with the named person or working as a servant of the named person.

(3) The person serving the summons shall write on the back of the other copy the place, date and time when he served the summons and the name of the person upon whom it was served and that person shall be required to acknowledge service by signature or thumb print.

(4) A court marshal or any officer of a Local Court serving a summons shall indorse at the back of a summons where a person refuses to acknowledge service.

(5) Where it is not practicable to effect service in the manner provided in the preceeding subrules, service of summons shall be effected by post.

(6) Where service of summons is effected by post, it shall be supported by affidavit.

Failure of
witness to obey
summons

11.—(1) If any witness shall, without reasonable excuse, fail to obey any witness summons lawfully issued under section 33 and in accordance with rules 9 and 10, the Local Court may issue a warrant for his arrest in Form 3 First Schedule in the First Schedule.

(2) Any witness arrested on the authority of a warrant under subrule (1) shall be brought before the Local Court and may be dealt with as provided in section 33.

(3) Before imposing any punishment, the Local Court shall ask the reason for the failure to obey the summons and if it considers that the reason given amounts to a reasonable excuse the court shall not impose any punishment.

PART IV—EVIDENCE

Swearing of
witnesses

12.—(1) Before giving evidence in any civil case, a witness shall make witnesses an oath or affirmation in accordance with the Oaths, Affirmations and Declarations Act:

Provided that where a Local Court is satisfied that a witness is unable by reason of immature age to understand the nature of either an oath or an affirmation, the court may receive his evidence, though not given on oath or affirmation, if, in the opinion of the Court, he has sufficient intelligence to justify the reception of his evidence.

(2) If a witness is to be sworn, he shall hold his right hand uplifted and repeat the words “I swear by Almighty God that the evidence I shall give shall be the truth, the whole truth and nothing but the truth”.

(3) If a witness is to be affirmed he shall raise his right hand and repeat the words “I solemnly, sincerely and truly declare and affirm that the evidence I shall give shall be the truth, the whole truth and nothing but the truth”.

(4) In every case there shall be noted on the court record whether a witness has been sworn or affirmed or whether his evidence has been taken without oath or affirmation under subrule (1).

13.—(1) In every case the evidence shall be recorded in writing in the evidence English language by the Chairperson. Recording of evidence

(2) Notwithstanding subrule (1), a Local Court may receive evidence in the language of the court as may be approved by the Chief Justice.

(3) At the close of each hearing the Chairperson shall—

- (a) sign his or her name and the date at the last line of the record;
- (b) record the time when the sitting of the court ceased.

14.—(1) If at any stage of a case a Local Court is not satisfied that it has jurisdiction to try the case, the court shall— Doubt regarding jurisdiction and transfer of case to a magistrate court

- (a) seek directions from the nearest magistrate court; and
- (b) if necessary, adjourn the case and submit the case record and the reasons therefor to such magistrate.

(2) An adjournment under this rule shall not be for a longer period than is reasonably necessary in the circumstances of the case and shall not in any event exceed twenty days.

(3) A Local Court may, on application or of its own motion, at any stage in a trial, transfer such trial for hearing before itself at some other place.

15. A Local Court may from time to time adjourn the hearing of any case for a reasonable period— Adjournments

- (a) if the hearing continues for more than a day;
- (b) if the court is not satisfied that it has jurisdiction to hear the case;
- (c) for any sufficient reason to be recorded on the record of the case.

16. Every case shall be called for hearing on the date fixed for the hearing date of hearing and shall be disposed of or adjourned. Cases to be called on date of hearing

17.—(1) If either party in a civil case does not appear whether after an adjournment or not, when the case is called for hearing the court may give judgment in default for the party who does appear. Absence of parties in a civil case

(2) If, when the case is called for hearing, neither party appears the Local Court may dismiss the case but without prejudice to re-instating the case within twenty days to hear the matter.

(3) A Local Court may in its discretion in any such case order an adjournment.

(4) Any judgment or order given or made in the absence of a party may, on his application and if good reason for such absence be shown, be set aside and the proceedings may be reheard upon such terms as to costs as the Court shall think fit.

(5) Notice of an application made pursuant to subrule (4) shall be given to the opposite party.

Absence of
plaintiff.

18. If a plaintiff in a civil case does not appear whether after an adjournment or not when the case is called for hearing, the court may dismiss the case but without prejudice to re-instating the case within twenty days to hear the matter.

PART V—PROCEDURE ON TRIAL OF CIVIL CASES

Procedure on
hearing

19.—(1) The hearing of every civil case shall be conducted in on hearing accordance with the procedure authorized by the customary law prevailing in the area of jurisdiction of the court, subject to the following provisions—

(a) if the defendant is absent and the court is satisfied that he or she has been served with the summons, the court may give judgment for the complainant upon receiving satisfactory proof of his or her claim or may adjourn the hearing to another date to permit the defendant to appear:

Provided that the court may, if good cause is shown, set aside any judgment which has been given in the absence of the defendant and may proceed to trial on such terms, as to costs or otherwise, as it considers just in the circumstances;

(b) if the defendant is present and admits the whole of the complainant's claim, the court shall forthwith give judgment for the complainant for the full amount of the claim;

(c) if the defendant is present and denies the complainant's claim, or any part of it, the complainant shall call such witnesses as he may desire to prove his claim; if the complainant himself wishes to give evidence he shall do so before he calls any other witness;

(d) if the defendant wishes to make an answer to the complainant's claim he may call witnesses to support his case; if the defendant himself wishes to give evidence he shall do so before he calls any other witness;

(e) after the defendant has called all his witnesses the Local Court shall give the complainant and the defendant an opportunity to sum up their evidence and make any other relevant submissions which they may wish;

(f) after considering all the evidence called and any submissions made by the complainant and the defendant, the Local Court, with the aid of assessors, if any, shall decide whether and to what extent the complainant's claim has been made out and shall give judgment accordingly;

(g) every judgment or order shall be recorded in writing and shall contain the reasons for the decision, and shall be signed by the Chairperson, who shall deliver it in open court.

(2) Where the customary law prevailing in the area in relation to the civil matter at hand is discriminatory or repugnant to justice, the Local Court shall have regard to the Constitution and principles of human rights

20.—(1) In any case in which—

Certificate of
Divorce

(a) an order dissolving a marriage has been granted by a Local Court;

(b) as the result of proceedings under subrules (2) and (3), a Local Court has declared a marriage to have been dissolved in accordance with customary law, such Court, upon application therefor and upon payment of the prescribed fee, may, in its discretion, issue a Certificate of Divorce in Form 4 in the First Schedule giving particulars of such dissolution.

(2) Proceedings under this subrule (1) may be taken in a Local Court for a declaration by the Court that a marriage celebrated in the area of the Court's jurisdiction in accordance with customary law only has been effectively dissolved in accordance with such law and such proceedings shall take the form of a civil case under these Rules and shall be commenced by a complaint made and entered respectively under rule 6 by one of the parties to the marriage.

(3) When a Local Court after the conclusion of a case under this rule is satisfied, upon hearing the evidence adduced before it in such case, that the marriage in question has been effectively dissolved in accordance with the customary law applicable, it may make a declaration to that effect.

21. If any judgment or order is delivered in the absence of either the complainant or defendant a copy of it shall be served on the absent party.

Judgement
delivered in
absence of
party

22. After the judgment or order has been delivered the Chairperson shall inform the party against whom judgment has been given, if he or she is present, of his or her right of appeal as laid down in section 41.

Right of
appeal to be
explained

PART VI—FEES

- Fees** **23.**—(1) All fees payable to Local Courts shall be paid to the clerk of such court who shall dispose of the same as from time to time directed by the Registrar of the High Court.
- (2) The fees prescribed in the second column of the Second Schedule shall be payable in respect of the proceedings in Local Courts, specified opposite thereto in the first column of the Schedule and no other fees shall be payable in respect of any proceeding in any Local Court.
- Power to remit fees** **24.** The Chairperson of any Local Court before which any proceeding specified in the first column of the Second Schedule is instituted, may, on the grounds of insufficient means or for other good cause, remit in whole or in part any fee specified in respect of such proceedings as he may think fit.
- Persons by whom fees payable** **25.** The fees specified in the second column of the Second Schedule shall, subject to rule 23, be paid by the persons specified opposite thereto in the third column of that Schedule.
- Order for repayment of fees** **26.** Any Local Court which disposes of any case or appeal may make repayment such order as the justice of the case requires, for repayment to a successful party by an unsuccessful party, of any fees paid under these Rules by such successful party.
- Exemption from fees** **27.** Neither the Government nor a local government authority shall be from fees required to pay the fees prescribed by these Rules.

PART VII—MISCELLANEOUS

- Chairperson, etc, of court having interest in case** **28.**—(1) If a Chairperson of a Local Court has any personal interest in any etc. case before the court, such Chairperson shall not preside over proceedings of interest the court relating to such case.
- (2) If any assessor is a party in any case before a Local Court or has any personal interest in any such case, such assessor shall not take part in the proceedings of the Court relating to such case.

FIRST SCHEDULE

FORM I

MALAWI

In the Local Court

Civil Case No. of 20

(1)
versus

(2)

CIVIL SUMMONS

(RULE 6)

To: (3)
.....

You are ordered to come to the Court house at (4)
 on (5) day the
 day of 20 at to answer the claim
 of (6)
 against you that (7)

If you fail to come to court judgment may be given against you in your absence.

Seal

Date

 Chairperson

NOTE:—See below for instructions on how to complete the form.

- (1) Insert name of complainant.
- (2) Insert name of defendant.
- (3) Insert name and address of defendant.
- (4) Insert place where defendant is to come.
- (5) Insert day, date and time of hearing.
- (6) Insert name of complainant.
- (7) Insert details of complaint.

FORM 2

MALAWI

In the Local Court

..... Case No of 20

(1)

versus

(2)

SUMMONS TO WITNESS

(RULE 9)

To: (3) of

You are ordered to come to the court house at (4)

on (5) day of

day of 20 at the hour of

as a witness on behalf of (6)

If you fail to come you will be liable to be punished.

Seal

Date

Chairperson

NOTE:—See below for instructions on how to complete the form.

(1) Insert name of complainant.

(2) Insert name of defendant.

(3) Insert name and address of witness.

(4) Insert place where witness is to come.

(5) Insert day, date and time of hearing.

(6) Insert name of person requiring attendance of this witness.

FORM 3

GOVERNMENT OF MALAWI
 CERTIFICATE OF DIVORCE
 (RULE 19)

G.N. (AFRICAN CUSTOMARY LAW MARRIAGES ONLY)
 12/1969

In the Local Court
 Civil Case No. 20

It is hereby certified that a divorce has been granted to the following persons
 subject to the conditions shown hereunder –

HUSBAND

WIFE

Name:	Name:
Village:	Village:
Chief:	Chief:
District:	District:

In the presence of the following *ankhoswe*—

Name:	Name:
Village:	Village:
Name:	Name:
Village:	Village:

.....

Payment of compensation has been ordered as under—

.....

*Marriage Certificate No issued by
 Local authority on (date) was produced by
 or

*No marriage certificate was produced.

The fee of K100 for this certificate has been paid on receipt No.

Date:

Local Court Chairperson

SECOND SCHEDULE

First Column	Second Column	Third Schedule
1. In all civil cases:		
(a) on or before the the issue of summons—		
(i) where the amount or value of property claimed exceeds K150.00	K100.00	Plaintiff
(ii) in all other cases ..	K100.00	Plaintiff
(b) on appealing to a District Appeals Local Court ..	K100.00	Appellant
(c) On appealing to the High Court	K100.00	Appellant
2. For a copy of the record of proceedings in a Local Court, including District appeals Local Court which record shall include any order, judgment, decree or decision of the Court ..		
	K 80.00	Appellant
3. In matrimonial cases for a Certificate of Divorce under rule 19 (1)		
	K100.00	Appellant

TRADITIONAL COURTS (ENFORCEMENT OF
JUDGEMENTS) RULES

ARRANGEMENT OF RULES

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2. Interpretation

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3. Appointment and payment of bailiffs
4. Application for the issue of sale order to be carried out by bailiff
5. Transmission to and receipt by bailiff of sale order
6. Sale order to be executed outside jurisdiction of Home Court
7. Service and execution of sale order
8. Powers of bailiff when executing sale order
9. Procedure by bailiff after seizure
10. Place of sale
11. Disposal of proceeds of sale

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13. Transfer order or sale order and property that may be seized
14. Applications to Court
15. Manner of applying to court and duties of applicant
16. Issuing of a sale order and transfer order
17. Processing of sale order and transfer order
18. Seizure of property

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20. Transfer to applicant
21. Notice of sale of property
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LOCAL COURTS (ENFORCEMENT OF JUDGEMENTS)
RULES

PART I—PRELIMINARY

Citation **1.** These Rules may be cited as the Local Courts (Enforcement of Judgments) Rules.

Interpretation **2.** In these Rules, unless a different meaning is clear from the words used—

“appropriate bailiff” means the bailiff appointed for the area in which the property is situated;

“Away Court” means the court in whose area the property to be seized is situated if it is not within the area of the Home Court;

“bailiff” means a person appointed by the Sherriff of Malawi under these Rules to execute sale orders;

“Home Court” means the court which imposed the fine, awarded the compensation or made the order of which enforcement is required;

“judgment creditor” means a person in whose favour an award of compensation or any other order has been made under sections 23 and 29 of the Act;

“judgement debtor” means a person ordered to pay a fine, compensation or other sum of money or to deliver, transfer or restore to a creditor any specific property under sections 19, 23 or 24;

“order” includes an award of compensation, the imposition of a fine and any other order under section 19, 23 or 24;

“sale order” means an order for the levy of a fine or compensation under section 19 or 23 of the Act and order for the seizure and sale of property under section 20 of the Act whether such seizure and sale is to be effected by a bailiff or by the court;

“transfer order” means an order under section 20 for seizure of any property and its delivery or transfer to a creditor.

PART II—SEIZURE AND SALE BY BAILIFF

Appointment and payment of bailiffs **3.—(1)** The Sherriff may appoint persons to be bailiffs and shall assign to each bailiff appointed under the Sherriffs Act the area in which he shall perform his functions.

(2) The Sherriff may pay such salary as he may consider reasonable and such salary shall be additional to the fees and expenses set forth in the First Schedule to which a bailiff may become entitled.

Application for the issue of sale order to be carried out by bailiff **4.—(1)** Where a judgement creditor desires a sale order to be made which the issue of sale is to be carried out by a bailiff, he shall apply to the Home Court in Form carried out by I in the Second Schedule and pay such fee as is specified in the Third Schedule and shall specify in his application—

- (a) the amount which he wishes to be levied by the sale of the judgment debtors movable property;
- (b) the place or places where any such property is situated; and
- (c) if required by the Court, all items of movable property which he has reason to believe are owned by the judgment debtor and are available to be seized:

Provided that the bailiff in executing any sale order made as a result of the creditor's application shall not be restricted in the seizure and sale of the judgment debtor's movable property to the items specified in the said application.

(2) If the Home Court is satisfied that the amount of compensation specified in the application is due and payable and that some or all of the items specified in the creditor's application are situated in the area of the Home Court or in another area where this Part applies and appear to be sufficient in value to realize the fees and expenses likely to be incurred by the bailiff in executing the sale order plus an amount sufficient to provide a substantial sum in satisfaction of or towards the amount due, the Home Court shall issue a sale order.

(3) The sale order shall be in Form 2 in the Second Schedule, shall be prepared in triplicate and all three copies shall be signed by the Chairperson of the Home Court.

(4) Where a court believes that a person, on whom a fine has been imposed by that court, has the means to pay the fine, it shall enquire into the means of such person to determine whether indeed the person is able to pay or not and, where the person is unable to pay, but has property liable to seizure, the court may, if the fine is immediately payable without any application being made, make a sale order for the levy of such fine.

(5) A sale order may be issued on the application of a creditor only for the amount of compensation due to the creditor at the time of his application together with the relevant costs and the fees set out in these Rules.

(6) Where the Local Court has ordered compensation to be paid by installments a sale order may only issue for the installment or installments which are due at the time of the application:

Provided that where the Local Court has previously ordered that in default of any installment of compensation being paid on the due date the full balance outstanding shall become due and payable, the sale order shall issue for such full balance.

(7) No sale order shall, without the written order of a Home Court or Away Court, as the case may be, issue in a criminal matter in respect of any compensation or fine regarding which an appeal is pending.

Transmission to
and receipt by
bailiff of sale
order

5.—(1) One copy of the sale order shall be filed at the Home Court and two copies of the sale order shall be sent to the appropriate bailiff within sale order three days by the most speedy and convenient means.

(2) The clerk of the Home Court shall endorse all the three copies of the sale order by inserting, as provided on each copy,—

(a) details of the name and address of the bailiff;

(b) the date upon which the two copies sent to the bailiff were sent to such bailiff; and

(c) the method by which the two copies were sent.

(3) Upon receipt of the copies of a sale order the bailiff shall endorse both copies by inserting details of the hour, the date, month and year they are received by him.

(4) Where the sale order is to be executed within the area of jurisdiction of the Home Court the bailiff shall proceed in accordance with rules 7 and 8.

Sale order to be
executed outside
jurisdiction of
Home Court

6. Where the sale order is to be executed outside the area of jurisdiction of the Home Court, the Home Court shall send the sale order to the Away jurisdiction Court which shall identify the appropriate bailiff to execute such order:

Provided that where the bailiff of the Home Court is better placed to execute a sale order that would otherwise be executed by a bailiff of an Away Court due to the geographical positions of the two courts, the bailiff of such Home Court shall execute the sale order.

Service and
execution of
sale order

7.—(1) The bailiff shall, after complying with rule 5, proceed to the place execution of where the debtor's property is believed to be and shall seize sufficient movable property of the debtor to satisfy the sale order including his fees and estimated expenses.

(2) Where the bailiff is unable to find any property of the debtor he shall endorse the sale order to that effect and return it to the Home Court or Away Court whichever is applicable.

(3) Where the endorsed sale order is returned to the Away Court, then the court shall transmit the sale order to the Home Court.

Powers of
bailiff when
executing sale
order

8.—(1) A bailiff shall have the following powers when executing a sale bailiff order—

(a) he may enter any dwelling house or other place between the hours of 6 a.m. and 6 p.m.;

(b) he may break open the inner doors of any building where the debtor's movable property is situate;

(c) he may break open the outer door or doors of any dwelling-house or other places where the judgment debtor's movable property is situated if so authorized by an order of the Court in whose area of jurisdiction the judgment debtor's property is situate;

(d) he may, subject to rule 27, take away any movable property which he has reason to believe to be the judgment debtor's property.

9.—(1) Subject to the directions of the Home Court or Away Court, the bailiff, may deal with the goods seized in execution of a sale order in his discretion either by depositing them in some fit place or by leaving them in the custody of a fit person who shall be put in possession by the bailiff.

Procedure by
bailiff after
seizure

(2) No property seized under a sale order may be sold until more than ten days after the day on which the property was seized and the judgment debtor has been given notice of the intended sale unless the property is of a perishable nature or the judgment debtor requests otherwise in writing.

(3) The bailiff shall make in triplicate an inventory of all the debtor's property seized under the sale order in Form 3 in the Second Schedule and he or she shall supply one copy of the inventory to the judgment debtor.

(4) The bailiff shall serve upon the judgment debtor and the clerk of the Local Court in whose area of jurisdiction the property is seized notice in writing of the time and the place where the property is to be sold and such notice shall be in Form 4 in the Second Schedule and shall be served upon the judgment debtor and the clerk of the Local Court at least 24 hours before the time fixed for the sale and no sale shall, subject to subrule (5), take place by auction or by private treaty unless such notices have been so served:

Provided that if the bailiff is unable to effect prompt personal service on the judgment debtor he or she shall effect service on the judgment debtor by leaving a copy of the notice with an adult person who is resident at or near the place where the property was seized, or if no such adult person is at such place by leaving a copy of the notice in a conspicuous position at that place.

(5) Where the sale order issued is for an amount or more than K5,000, the sale shall be by public auction:

Provided that upon application of the bailiff, and with the consent of the debtor, the Home or Away Court may order otherwise;

Provided further that where the property seized is of a perishable nature and where immediate sale appears necessary to preserve its value to the judgment debtor, the Court in whose area of jurisdiction the property was seized may, upon application by the bailiff, order an immediate sale by auction or otherwise.

(6) Where the seized property is to be sold by auction, the sale shall be held by the bailiff or a licensed auctioneer appointed by the Sheriff and such bailiff or auctioneer shall complete a Report of Sale in Form 9 in the Second Schedule indicating all the debtor's property sold and the price of each item.

(7) The bailiff and such auctioneer shall be entitled to fees and expenses in accordance with the scales set out in the Third Schedule:

Provided that the Sheriff may disallow all or any part of the fees and expenses of a bailiff and auctioneer in any case where such fees and expenses or any part thereof relate to unnecessary or excessive actions taken by the bailiff or auctioneer in the execution of the sale order.

Place of sale

10.—(1) The sale of the seized property, whether by auction or otherwise, may take place, at the bailiff's discretion, anywhere within the District in which the property was seized:

Provided that the Sheriff may order the seized property to be sold elsewhere upon the application in writing of the bailiff, the judgment creditor or the judgment debtor.

(2) The clerk of the Local Court in whose area of jurisdiction the property was seized shall attend at the sale as clerk to the sale.

Disposal of
proceeds of
sale

11.—(1) Upon completion of a sale, the proceeds shall be deposited in the proceeds of Sheriff's account within seven days and the Sheriff shall arrange—

(a) for the payment to the bailiff of the bailiff's fees;

(b) for the payment to the judgment creditor of the amount payable under the sale order;

(c) subject to section 43 of the Bankruptcy Act, for any surplus to be paid to the debtor.

(2) Where two or more sale orders have been received by the same bailiff in respect of the judgment debtor prior to the seizure of any property under any of the orders and the proceeds of sale, after paying the bailiff's fees and expenses, are insufficient to pay in full all the sums due, the Sheriff shall arrange payment rateably.

(4) Upon completion of the sale, the bailiff shall send to the Home Court, the Sheriff and the judgment debtor one copy of each of the inventory showing separately the amount for which each item or group of items of the debtor's property was sold, which copy shall be countersigned by the clerk of court who attended the sale.

(5) The bailiff shall, at the same time as he sends the inventory to the Home Court, return to the Home Court and Away Court, where applicable, one copy of the sale order endorsed as provided in Form 3 in the Second Schedule.

(6) The Clerk to the Home Court shall indorse on the copy of the sale order originally filed at the Home Court the date upon which the sale order was received from the bailiff, and the amount notified to him to have been paid to the judgment creditor.

PART III—SEIZURE BY COURT

12. In this Part and in Part IV, unless a different meaning is clear from the words used— Interpretation

“applicant” includes a judgment creditor on whose application a sale order or transfer order has been made, and his or her duly authorized representative;

“property” means livestock including cattle and property of any other class which the Chief Justice has prescribed may be seized under a sale order or transfer order.

13.—(1) A Local Court may issue a transfer order for the purpose of seizing order or sale from a judgment debtor and transferring to a judgment creditor property to property that may be seized which the judgment creditor is entitled under an order made under section 19 or property to be transferred at a valuation. Transfer order or sale order and property that may be seized

(2) A Local Court may issue a sale order under this Part for the purpose of seizing property from a judgment debtor for sale in order to satisfy in whole or in part an order for payment of a fine or of compensation payable in money under section 19 and 22.

14.—(1) Where a Local Court has made—

Applications
to Court

(a) an order for restitution of property;

(b) an order for specific performance of a contract;

(c) any other order under section 19 of the Act requiring specific property to be delivered by a debtor to a creditor, and the order has not been complied with within the time fixed by the Court, a judgment creditor who desires that the order be enforced by seizure of property referred to in the order and its transfer to him or her may apply in the manner prescribed in Form 5 in the Second Schedule to that court for a transfer order.

(2) Where a Local Court has made an order for payment of compensation in the form of money and such compensation or any instalment thereof has not been paid by the due date, a judgment creditor who desires that the order be enforced by seizure of property of the judgment debtor and its transfer to the judgment creditor at a valuation, may apply in the manner prescribed in Form 6 in the Second Schedule to that court for transfer.

(3) Where a Local Court has made an order for payment of compensation in the form of money and such compensation or any instalment therefor has not been paid by the due date, a judgment creditor who desires that the order be enforced by seizure of property of the judgment debtor and sale by the court, may apply in the manner prescribed in Form I in the Second Schedule.

Manner of
applying to
court and duties
of applicant

15.—(1) An application for a transfer order or sale order shall be made to applying to the Chairperson in chambers and shall set out all the information specified in the relevant form.

(2) It shall be the duty of the applicant for a transfer order or sale order to satisfy the Chairperson that—

(a) the relevant provisions of rule 14 apply;

(b) the property to be seized is within the area of jurisdiction of the court;

(c) such property belongs to the judgment debtor;

(d) the applicant is willing and able, in person or by a fully authorized representative, to accompany court officers carrying out the seizure to point out the property and, where appropriate, agree the value of the property seized.

(3) In giving information about the judgment debtor's property, the applicant for a transfer order or sale order shall provide sufficient details of the place where the property is and description of the property for easy identification by the Court.

(4) Before issuing a transfer order or a sale order, the court shall satisfy itself that the applicant understands his or her liabilities under these Rules if a dispute should arise regarding ownership of the property.

(5) The fee prescribed in item I in the Third Schedule shall be paid at the time when the application is made.

Issuing of a sale
order and
transfer order

16. Where the Chairperson of the Court to which an application is made under rules 14 and 15 is satisfied—

(a) that the relevant provisions of those rules have been complied with; and

(b) that the property specified in the application is within the area of jurisdiction of the court, he or she may, in accordance with the application, issue a sale order or transfer order in Form 7 in the Second Schedule.

Processing of
sale order and
transfer

17.—(1) A transfer order and sale order shall be prepared in triplicate and signed by the Chairperson, one copy of which shall be retained on the file of the Court and two copies shall be issued to officers of the court directed to carry out the order.

(2) A transfer order and a sale order shall be deemed to be issued on the date of signature and shall be carried into effect within seven days.

18.—(1) A transfer order or a sale order shall be carried into effect by one property or more officers of the court accompanied by an assessor and the applicant or his or her fully authorized representative if he or she so wishes. Seizure of property

(2) On arrival at the place indicated by the applicant or his representative, an officer of the court shall inquire whether the judgment debtor whose property is to be seized is present and if he or she can be found shall serve on him or her a copy of the transfer order or sale order.

(3) After effecting service under subrule (2), an officer of court or assessor shall explain the purpose of the visit and the applicant shall, where appropriate, agree with the judgment debtor on the property to be seized and the value of such property.

(4) Where an agreement cannot be reached between the applicant and the judgment debtor, the assessor shall make such inquiries as he or she considers desirable to determine what property to seize to ensure that the proposed seizure appears reasonable and proper and shall then instruct the officer of the court what property to seize.

(5) If the judgment debtor whose property is to be seized cannot with due diligence be served personally with the transfer order or sale order, the assessor shall require the applicant or his or her representative to point out the property to be seized.

(6) Where subrule (5) applies, the assessor shall make inquiries as he considers desirable to ensure that the proposed seizure appears reasonable and proper and shall then instruct the officer of the court what property to seize, deliver a copy of the transfer order or sale order to an adult person who is a resident at or near the place for transmission to the judgment debtor or, if no such adult person is at the place, leave a copy of the or transfer order sale order in a conspicuous position at the place.

(7) The officer of the court shall seize and take away the property indicated in the instructions given to him by the assessor and shall return with such property to the Local Court.

(8) An officer of the court shall for the purpose of seizing property have all the powers of a bailiff under rule 8.

PART IV—VALUATION, TRANSFER AND SALE BY COURT

19.—(1) Where property is seized under a transfer order for transfer to a creditor at a valuation, an officer of court or assessor shall invite the judgment debtor, if present, to agree with the applicant or his or her representative the value of the property seized and if a value is so agreed shall cause particulars thereof to be entered on one copy, or if possible both copies of the transfer order. Valuation

(2) Where the applicant and the judgment debtor agree as to the value of property pursuant to subrule (1), the officer of the court or assessor shall make the parties sign an agreement document which shall form part of the court record.

(3) If the judgment debtor refuses or fails to agree with the applicant or his or her representative pursuant to subrule (1) the value of the property seized, the officer of court or assessor shall inform the judgment debtor, if present, that the property seized will be taken to the court and there by the immediately to be valued Chairperson and that he or she may attend the Court if he or she so wishes.

(4) The property seized shall be taken to the court where the Chairperson shall inspect the property and if the valuation of the property has been agreed upon between the judgment debtor and the applicant, the Chairperson shall cause the particulars thereof to be recorded as the value fixed by the court on the copy of the transfer order on the court file and shall sign it and another copy of the transfer order which shall be delivered to the applicant.

(5) Once the property is taken to the Court, and if no valuation of the property seized has been agreed upon between the judgment debtor and the applicant, the Chairperson, with the assistance of the assessor and after which hearing anything the judgment debtor and the applicant or either of them if present, wish to say, shall value the property and cause the particulars thereof to be recorded in the manner set out in subrule (4).

Transfer to
applicant

20.—(1) Where property is seized under a transfer order for transfer to a applicant judgment creditor otherwise than at a valuation, it shall be taken forthwith to the court and inspected by the Chairperson, who shall cause particulars thereof to be recorded on the copy of the transfer order on the court file and on another copy of the order and shall sign the particulars so recorded and deliver one copy of the order so signed to the applicant.

(2) After the provisions of subrule (1) or rule 19 (4) and (5) have been complied with, the applicant shall, subject to rule 22, take away the property seized which shall, subject to rule 28, become the applicant's property:

Provided that if the value of the property seized exceeds the amount due to the applicant, the applicant shall be required to pay to the judgment debtor the difference between such value and the amount due.

(3) The liability of the judgment debtor to the applicant shall be extinguished by a transfer to the extent of the property transferred or in case of transfer at a valuation, to the extent of the value so fixed, less any sum paid under the proviso to subrule (2).

21.—(1) Where the property has been seized under a sale order it shall immediately be taken to the court and inspected by the Chairperson, who shall cause particulars of the property seized to be recorded in quadruplicate in Form 8 in the First Schedule and shall retain one copy thereof on the file, deliver one copy to the applicant and cause another copy to be served on the judgment debtor. Notice of sale of property

(2) The applicant shall thereupon remove the seized property and keep it safely until notified of the date fixed for the sale.

(3) The Chairperson shall fix a place and date for the sale of the property and such date shall not be less than ten days after the date of seizure unless the property is of a perishable nature and an earlier sale appears necessary in the interests of the judgment debtor in which case the Chairperson may fix a date for the sale of the property seized or the portions of it which are perishable on the first convenient day after seizure.

(4) The court shall publish a list of the properties seized and offered for sale and shall also publish the time, date and place of the sale and such publication shall not be made less than forty eight hours before the time fixed for the sale.

(5) Publication for the purpose of subrule (4) shall be deemed to have been duly made if a copy of the notice of sale containing a list of the property to be sold is displayed visibly at the place where the sale is to take place and outside the court and at such other place as the court may consider desirable.

22.—(1) If the applicant shall fail to remove the seized property in accordance with rule 21 (2), the Court shall proceed to sell such property either by private treaty or by public auction. Failure of applicant to take property

(2) The Court shall dispose of the proceeds of the sale by paying—

- (a) the applicant the amount due under the sale order;
- (b) for the costs of storage; and
- (c) any surplus to the judgment debtor.

23. The Court may, in any case in which it considers it desirable to do so, court direct the storage at the court of any property seized pending transfer to the judgment creditor or sale. Storage by court

24.—(1) The applicant having custody of the property seized and the court which made the sale order shall be notified by the Chairperson of the court which is to conduct the sale of the place and date fixed for the sale. Sale of property

(2) The court shall cause the property to be sold to be at the place of sale at the fixed time whether such property is in the custody of the court itself or the applicant.

(3) The sale shall be conducted by court officers as the Chairperson may assign who shall be assisted by the clerk of the court which issued the sale order.

(4) Except where the property is of a perishable nature, it shall be sold by public auction and the clerk of the court who attends the sale shall record the price paid for each item sold.

(5) Where the property is of a perishable nature it may be sold by private treaty if the court is satisfied that a fair price may be obtained.

(6) Half of the amount of the fees payable to a bailiff under item 2 (a) in the First Schedule shall be payable to the Local Court in respect of every sale by a Local Court under this Rule.

Report of sale

25.—(1) At the conclusion of the sale, the court officers shall prepare a report in Form 9 in the Second Schedule, showing the items sold and the price paid for each and such report shall be signed by one of the court officers and the clerk of court who attended the sale and shall contain a true and correct record of all transactions, and particulars of the fee payable.

(2) If any property remains unsold at the end of the auction, the court officers assigned to conduct the sale may sell the same by private treaty if a fair price can be obtained and pending such sale the unsold property shall be looked after by the Court.

(3) Every sale by private treaty shall be recorded in the sale report.

(4) The proceeds of every sale after deducting the fee payable under Rule 24 (6) shall be forthwith paid to the applicant who shall sign a receipt for the money:

Provided that if the net amount realized as a result of the sale exceeds the amount shown in the sale order as being due to the applicant, the surplus shall be paid to the judgment debtor.

Responsibilities
of the
applicant

26.—(1) Where property seized under a transfer order is transferred to an applicant at a valuation or otherwise, the applicant shall keep such property in safe custody for a period of ten days and if within that period he or she is notified by the court of an objection he or she shall continue to hold such property in safe custody until the objection is withdrawn or decided upon by the court.

(2) If an objection is made in due time that any of the property seized under a sale order or transfer order does not belong to the judgment debtor and the applicant does not dispute the objection or the objector establishes his or her claim, the applicant shall be responsible for returning the property to the place where it was seized and to pay to the objector any expenses or costs incurred by the objector in relation to his or her objection as fixed by the court.

(3) An applicant who fails to deliver to an objector property in accordance with a direction of the court shall be liable to pay to the objector double the value of the property as assessed by the Chairperson of the Court.

(4) An applicant to whom property is transferred or entrusted under these Rules shall take all reasonable steps to maintain such property in the condition in which he or she received it and if any such property is missing or is reduced in value as a result of misuse or the neglect by an applicant of his or her obligations under this subrule the applicant shall be liable to make good the loss.

PART V—GENERAL

27. The following property shall be exempt from seizure under these Rules— Exempt property

- (a) the debtor's wearing apparel not exceeding in value K10,000;
- (b) cooking utensils, and bedding of the judgment debtor of his family and such food as is clearly required for use by the judgment debtor or his or her family;
- (c) the tools or implements of the judgment debtor's trade not exceeding in value K15,000.

28.—(1) At any time not later than seven days after the seizure of any seizure property under a sale order or transfer order any person may lodge at the Court in whose area of jurisdiction the property was seized a written objection in Form 10 in the Second Schedule that the property seized or any part of it was not the property of the judgment debtor at the time of seizure. Objection to seizure

(2) Upon receipt of an objection the court shall fix a date for the hearing thereof and shall give notice of the date so fixed to the objector and—

- (a) in the case of a seizure by a bailiff, to the bailiff, the judgment creditor and the judgment debtor;
- (b) in the case of a seizure by the court under a sale order, an officer of the relevant Local Court, the applicant and the judgment debtor;
- (c) in the case of a seizure by the court under a transfer order, to the applicant and the judgment debtor.

(3) Upon receipt of a notice of objection -

- (a) a bailiff or an officer of a local court shall suspend the sale of the property claimed pending further order of the court; and
- (b) an applicant holding the property claimed shall hold it in safe custody pending further order of the court.

(4) If at the beginning of the objection the objector appears and establishes his or her claim to any of the seized property specified in his written objection, the court shall order that such property be returned to him or her by the person in whose custody the property is and shall make such further order as it thinks fit for the payment to the objector by the judgment creditor, the applicant, the judgment debtor or the bailiff of any expenses or costs incurred by the objector by reason of the seizure or by reason of the arising out of the return of the property to the objector.

(5) If the objector fails to appear at the hearing of the objection or fails to establish his or her claim in respect of any of the property claimed, the Court shall order the sale order or transfer order in respect of that property to be carried out and may make such further order as it thinks fit for the payment by the objector to any of the persons concerned of any expenses or costs incurred by reason of the objection.

Protection of
persons
obtaining
property under
sale order or
transfer order
without notice
of objection or
where objection
has failed

29.—(1) Where any property is seized under these Rules and is sold or persons transferred without any objection having been made in accordance with these property under Rules or after every objection in respect thereof has failed—

(a) the purchaser of such property sold and the applicant to whom or where objection has property is transferred shall acquire a good title thereto; and failed

(b) no person shall be entitled to recover against the bailiff or anyone lawfully acting under his or her authority, an officer of court who attended to the seizure and sale thereof Officer or the applicant to whom property is transferred any compensation in respect of the seizure, sale or transfer of such property:

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Provided that this subrule shall have effect subject to the provisions of sections 42 and 43 of the Bankruptcy Act.

(2) A bailiff or officer of court who enters any dwelling house, building or other place in the reasonable belief that property liable to seizure under these Rules is in that dwelling house, building or other place or who breaks any door in the exercise of the powers conferred on him or her by these Rules shall be under no liability to any person in respect of such entry or breaking.

Suspension of
sale order
withdrawal and
satisfaction

30.—(1) A Home Court may, at any time prior to the sale of any property sale order, seized under a sale order, upon the application of any interested party, suspend and the operation of the sale order upon such terms and conditions as the court shall think fit.

(2) An applicant may at any time, by notice in writing to the court which made the order, withdraw a sale order or transfer order:

Provided that in the case of a sale order—

(a) such notice is given in sufficient time prior to the sale; and

(b) in the case of seizure by a bailiff, the applicant pays to the bailiff the fees to which the bailiff is entitled and the cost of returning the property seized to the place of seizure.

(3) The judgment debtor or any person on his behalf may at any time before the sale of property under a sale order pay to the bailiff or an officer of court as may be assigned by the Chairperson who is to conduct the sale the full amount due under the sale order and, in the case of a bailiff, the fees to which the bailiff is entitled at the time of payment and thereupon the property seized shall be released to the judgment debtor.

(4) Where property has been seized under a transfer order for transfer to an applicant at a valuation, the judgment debtor or any person on his behalf shall pay to the court which issued the transfer order the full amount due under such order and thereupon the court shall instruct the applicant to release the property to the judgment debtor or other person on his behalf:

Provided that an applicant shall not be liable to release the property transferred to him at a valuation unless the amount due in satisfaction of the transfer order is paid within 10 days after the date of seizure.

31.—(1) A sale order and a transfer order shall remain in force for one validity and year only after its issue unless renewed for such further period by the Court which made the order.

Period of
validity and
renewal

(2) A sale order or transfer order may be renewed once only.

(3) Nothing in this rule shall prevent a judgment creditor from applying for another sale order or transfer order.

32. No officer of any Local Court or any bailiff involved or any person certain employed by a bailiff to assist in the execution of a sale order may himself or through any other person, purchase any property seized by virtue of such sale order.

Prohibition of
certain
purchasers

33. Service of a notice under these Rules shall be personal whenever personal service is practicable but if the person to be served cannot with due diligence be found a copy of the notice may be left for him at his last known address and shall be deemed to have been duly served 24 hours after it was so left.

Service of
notice

34. The Chief Justice may make such orders and give such directions for Chief Justice the proper accounting of receipts and payments and for all such matters under these Rules as may appear to him necessary or desirable.

Powers of
Chief Justice

SECOND SCHEDULE
GOVERNMENT OF MALAWI

APPLICATION FOR SALE ORDER

FORM I

(RULES 4 (1) and 14 (3))

The Chairperson,

.....Local Court
..... (1)

*Criminal /Civil Case No. of 20.....

I,
of (2)
hereby apply for a Sale Order in respect of the above case in which
..... of
..... (3) was ordered to pay me the sum of K..... as
compensation and of which sum the amount of K..... has not yet been
paid to me as ordered.

I hereby wish the Court to levy the sum of K.....,
together with any amount sufficient to cover any costs incurred, by seizure and sale
of the following property which I truly believe to belong to the said
.....(3), such property being—

..... situate at (4)
..... situate at
..... situate at
..... situate at
..... situate at

Date: Signed:.....

Applicant

Received in Local Court ata.m. / p.m.
on the..... day of, 20.....

.....
Chairperson

Fee of K..... paid on General Receipt No. dated.....

NOTE:- *Delete as applicable.

- (1) Write name of Court which first heard the case.
- (2) Write name and address of applicant.
- (3) Write name of judgment debtor.
- (4) Write description of property to be seized and place where it may be found.

FORM 2

GOVERNMENT OF MALAWI

SALE ORDER

(RULE 4)

To:

.....

*Criminal /Civil Case No..... of(2)

WHEREAS..... of
.....(3)

was ordered in the above case to pay the sum of K.....
as *fine/compensation and whereas he has failed to pay the sum of
K.....you are hereby ordered to seize the property of the name said

.....
(3) and to sell it so as to realize the sum of K.....plus costs of
K..... and such other costs as may be incurred by such seizure
and to account for such money as may be received at such sale in the manner
prescribed by the Chief Justice.

Date:.....

Seal

.....
Chairperson

..... Local Court

Name of Bailiff (4) Two copies sent to Bailiff

Address on (5)

..... sent by..... (6)

(Rule 5 (2)) Signed:..... (7)

Sale order received at a.m./p.m on the

..... Day of 20.....

..... (8)

(Rule 6 (1)) *Bailiff*, *District*

Certified that this order was produced for inspection by me on
 (date).....

..... (9)
 (Rule 6) *Chairperson*

..... Local Court

NOTE- See below for instructions on how to complete this form-

- (1) Write name and address of Bailiff who is to seize the property.
- (2) Enter details of original case for which this order is made.
- (3) Enter name and address of judgment debtor.
- (4) Write name of Bailiff to whom this order is sent.
- (5) Enter date order sent to Bailiff.
- (6) Enter method by which order was sent.
- (7) Signature of clerk of court which issued the order.
- (8) Signature of Bailiff to whom this order is sent.
- (9) Signature of Chairperson of "away" court when sale is to be conducted in area of another court.

*Delete as applicable.

PART II

The Court Chairperson,

..... Local Court,

.....

I hereby certify that—

(a) *I was unable to find any property belonging to the debtor named in this sale order.

(b) I have seized and sold property belonging to the debtor named in this sale order and have realized the sum of K and have accounted for this sum as instructed by the Sheriff. The details of the sale are as shown in the attached inventory.

.....
 *Delete as applicable, Bailiff, District.

Rule 7 or 11 (3))

Sale order received back from the Bailiff, District,
 on (date)

.....
 Clerk, Local Court
 Amount of K..... paid to creditor on P.V. No. of
 Amount of K..... paid to revenue on GR of
 Balance of K..... paid back to debtor on P.V. No..... (1)
 of

Certified that I have entered these amounts in the relevant case records.

Date:.....

(Rule 11 (4)) Clerk, Local Court

NOTE:—(1)

These amounts and details will be notified to the court by the Sherriff.

FORM 3

GOVERNMENT OF MALAWI

INVENTORY OF GOODS SOLD

(RULE 9 (3))

The Court Chairperson,

..... Local Court,
(1)

*Criminal /Civil Case No. of 20.....

I hereby certify that in accordance with the sale order issued to me by your Court on (date) I seized and sold the following items of property belonging to the said of (2) named in that order and received the amounts stated for each such item:—

	<i>Item</i>	<i>Price Received</i>
(1)	K.....
(2)	K.....
(3)	K.....
(4)	K.....
(5)	K.....
	TOTAL	K.....

This sum of K..... has been brought to account on General Receipt No..... dated at the office of The Treasury Cashier, District. A copy of the Form GP 96 has been sent to the Sheriff.

.....
Bailiff, *District*

Countersigned as correct by:

Date:..... Clerk of the Local Court.

NOTE:- *Delete as appropriate.

- (1) To be addressed to the court which issued the Sale Order.
- (2) Insert name of debtor as shown in Sale Order.

FORM 4

GOVERNMENT OF MALAWI

NOTICE OF SALE

(RULE 9 (4))

To:

 (1)

Copy to: The Court Clerk,
 Local Court,
 (2)
 *Criminal Civil Case No. of 20.....
 Local Court,

Take notice that in accordance with the instructions given to me in the Sale Order issued by the (3)

Local Court, arising out of the above case, I shall sell your property which I have duly seized at the time and place and on the date which I have written below:—

Date of sale.....

Time of sale..... a.m. / p.m

Place of sale.....

In accordance with Rule 10 (2) the clerk of the (2)

Local Court, to whom this notice is copied, is required to attend and assist at the sale.

Date:.....

Time:..... (4) Bailiff, District

NOTE:- *Delete as applicable.

- (1) Write the name and address of the debtor.
- (2) Write name of Local court in whose area the sale is to take place.
- (3) Write name of Local Court which issued the Sale Order.
- (4) Write date and time when this notice is signed.

FORM 5

GOVERNMENT OF MALAWI
APPLICATION FOR TRANSFER ORDER

(RULE 14 (1))

The Court Chairperson,

..... Local Court,
.....(1)

*Criminal/Civil Case No. of 20.....

I,
of(2)
hereby apply for an Order of Transfer in respect of the following property which
belongs to—

.....
of(3)

PROPERTY TO BE TRANSFERRED TO ME

- (1)(4)
(2)
(3)
(4)
(5)

*I hereby confirm that the above property was awarded to me by the Court
in the above case and that it has not yet been given to me.

Or

*I hereby confirm that the above named (3)
was ordered by the Court to perform the following contract and has failed to do so;
and I claim the above property in satisfaction of the contract.

The contract was to..... (5)

.....

Signed.....

Applicant

Date:.....

NOTE:—*Delete as applicable.

- (1) Write name of Local Court which heard the case.
- (2) Write full name and address of Applicant for this order.
- (3) Write name of debtor
- (4) Give details of the property which is required to be transferred.
- (5) Give details of the contract which has not been completed.

GOVERNMENT OF MALAWI

APPLICATION FOR TRANSFER OF PROPERTY AS A VALUATION

(RULE 14 (2))

The Court Chairperson,

..... Local Court,
 (1)

*Criminal / Civil Case No. of 20.....

I,
 of (2)
 hereby apply for an Order transferring to me the property set out below which
 belongs to (3)
 of and
 to place a value on such property.

I certify that the said (3) was ordered by the Court
 to pay me the sum of K by
 (4) and that he still owe me the sum of K in accordance with the
 order.

The following is the property owned by the said
 (3) which I now ask the Court to transfer to me at a valuation so as to satisfy the debt
 owned to me as stated above—

	<i>Property</i>	<i>Value estimated by Applicant (5)</i>	<i>Valuation made by Local Court (6)</i>
(1)	K.....	K.....
(2)	K.....	K.....
(3)	K.....	K.....
(4)	K.....	K.....
(5)	K.....	K.....
	Total Value	K	K

Date: Signed:

Applicant

NOTE- *Delete as applicable

- (1) Write name of Court which heard the case.
- (2) Write name and address of applicant.
- (3) Write name and address of debtor.
- (4) Write date by which Court ordered this sum to be paid.
- (5) Write description of property and value assessed by applicant.
- (6) Court to write value assessed after inspection.

FORM 7

GOVERNMENT OF MALAWI

*SALE

ORDER FOR SEIZURE OF PROPERTY AND *TRANSFER

*TRANSFER AT VALUATION

(RULE 16)

To:(1)

*Criminal / Civil Case No..... of 20.....

WHEREAS this court ordered you to

*Pay the sum of K..... to (2)

*Carry out your contract with (2)

to (3)

*Hand back property, namely..... (4)

to..... (2)

and whereas you have filed to obey such order of this Court by the due date.

Now.....(2)

has applied to this Court for seizure of your property sufficient to satisfy his claim and asked that this Court

*sell such property.

*transfer to him or her such property.

*transfer to him or her such property at a valuation.

This Court now hereby orders the seizure of sufficient of your property to satisfy the just claim of (2), and such costs as have been incurred, which property shall be more clearly defined on the back of this Form by the Court Officer who carries out this order. Such property shall be brought to this Court where it will be disposed of after 10 days by—

*sale.

*transfer to the applicant.

*transfer to the applicant at a valuation.

Date:..... Chairperson, Local Court

NOTE:— Delete as applicable.

(1) Write name of debtor.

(2) Write name of applicant for order.

(3) Write details of the contract.

(4) Write details of property.

SCHEDULE OF PROPERTY SEIZED

<i>Description of Property</i>	<i>Valuation made by Court</i>
.....	K.....
.....	K.....
.....	K.....
.....	K.....
Total valuation	<hr/> K <hr/>
Certified that the above schedule contains a full description of all property seized.	Certified that the valuation shown above has been assessed as fair and reasonable by this Court.
..... <i>Chairperson</i>	
..... <i>Court Officer</i>
..... <i>Applicant</i>	Chairperson,.....Local Court
Date:	Date:

FORM 8

GOVERNMENT OF MALAWI

RECORD OF PROPERTY SEIZED FOR SALE BY COURT

(RULE 21)

*Criminal / Civil Case No. of 20.....

The following property has been duly seized by this Court under Rule 14 (4) and is to be sold to satisfy the debt due in the above case together with all necessary costs—

<i>Details of Property Seized</i>	<i>Valuation made by Court</i>
.....	K.....
.....	K.....
.....	K.....
.....	K.....
.....	K.....
.....	K.....
Total Valuation	K.....

Copy served upon Debtor

by(1) Chairperson,..... Local Court

Date:

NOTE:— *Delete as applicable

(1) Write name of person who served copy.

FORM 9

GOVERNMENT OF MALAWI

REPORT OF SALE

(RULE 25)

*Criminal/Civil Case No. of 20.....

In accordance with rule 25, I hereby submit the following report on the sale of the property of
 (1) which was carried out on (date).

The following items were sold by public auction and the value shown against each item was duly paid to me—

<i>Item</i>	<i>Amount paid</i>
.....	K.....
.....	K.....
.....	K.....
.....	K.....
.....	K.....
.....	K.....

The following items were sold by private treaty and the value shown was duly paid to me—

.....	K.....
.....	K.....
.....	K.....
.....	K.....
Total value	K.....

The total money received by me from the above sales was K.....
 and this has been accounted for by crediting it to Head
 Item..... for which General Receipt No.
 dated was issued to me by the Treasury Cashier,

The General Receipt and a copy of the Form G.P. 96 have been sent by me to the Sheriff on (date).

The following fee is payable out of this amount—

Fee for sale: K..... (RULE 24 (6)).

Date:.....

.....
Local Courts Officer

.....
Clerk, Local Court

NOTE:—*Delete as applicable.

(1) Write name of owner of property.

FORM 10

GOVERNMENT OF MALAWI

OBJECTION TO SALE/TRANSFER*

(RULE 28)

The Court Chairperson,

..... Local Court,

..... (1)

*Criminal/Civil Case No. of 20.....

I,

of

hereby claim that the following property seized by your Court from

of (2)

is not the lawful property of the said (2)

and I hereby lay claim to the property listed below—

LIST OF PROPERTY CLAIMED

.....

.....

.....

Date Signed (3)

To:

.....

..... (4)

Take notice that the above objection has been received by this Court and that a hearing into the claim will be made at this Court on (date) at (time).

Date:.....

.....

Clerk, Local Court

ORDER OF THE COURT

As a result of the hearing of the above claim made in this Court on (date) the Court now makes the following order—

.....

.....

Date :.....

.....
Chairperson, Local Court

- NOTE:— *Delete as applicable.
- (1) Write name of objector.
 - (2) Write name of Debtor.
 - (3) Signature of Objector.
 - (4) Send copied to persons as listed in rule 29 (2)

THIRD SCHEDULE

rr.4(1) and 15 (5)

Fees payable by applicants to Court on every application for an order for sale, transfer or transfer at valuation—

	K	t
(i) Where the amount for which the application is made, excluding any costs, is less than K100 in value . .	20	00
(ii) Where the amount for which the application is made, excluding any costs, is K100 or more	25	00

